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R E P O R T S
OF
C A S E S
DECIDED IN THE
HOUSE OF LORDS,
ON
APPEALS AND WRITS OF ERROR,

DURING THE SESSIONS

1839 & 1840.

By C. CLARK AND W. FINNELLY, Esqrs.
BARRISTERS AT LAW.

VOL. VII.

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1842.



CHIEF JUDGES AND LAW OFFICERS
DURING THE PERIOD OF THESE REPORTS.

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Master of the Rolls :
L O R D L A N G D A L E.

Vice Chancellor :
S I R L A N C E L O T S H A D W E L L.

Lord Chief Justice of the Court of Queen's Bench :
L O R D D E N M A N.

Lord Chief Justice of the Court of Common Pleas :
R I G H T H O N. S I R N. C. T I N D A L.

Lord Chief Baron of the Court of Exchequer :
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*Solicitor General :—*S I R R. M. R O L F E.

*Lord Advocate of Scotland :—*A. R U T H E R F U R D, E s q.

L O N D O N :
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ERRATUM :

The line printed as the first line of p. 28 should be at the top of p. 29.

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REPORTS OF CASES

HEARD AND DECIDED

IN THE HOUSE OF LORDS.

EDWARD SHEEHY and Others - - *Appellants.*

LORD MUSKERRY - - - - - *Respondent.*

1837 :
December 7, 8.
11, 12. 14. 18.

1839 :
June 11.

A BILL was filed in Chancery in *Ireland*, impeaching leases and mortgages as not in due execution of powers in a settlement; also impeaching, on various grounds, a decree of the Court of Exchequer, and a sale in pursuance thereof, of the mortgaged estates, subject to the leases. When the cause came to be heard the plaintiff's counsel informed the Court that no judgment would be required as between the plaintiff and mortgagees, an arrangement being in progress by which the mortgagees and purchaser under the Exchequer decree consented to a redemption of the estates, on payment by the plaintiff of a sum certain. The Lord Chancellor then heard counsel as to the validity of the leases, but conceiving that the consideration of the question as to the validity of the mortgages and sale was withdrawn by the arrangement, and that in the absence of the purchaser he had no jurisdiction to give a decision on the leases, he dismissed the bill as against the defendants claiming the benefit of them. HELD by the Lords, on an appeal against a decree made on rehearing, which reversed the decree of dismissal, that it was open to the Lords to consider the merits of this decree, though not appealed from, and to declare that the arrangement, instead of withdrawing from the consideration of the Court the plaintiff's claim to relief against the mortgages and sale, was an admission of his right to that relief; that the decree of dismissal was therefore erroneous, and that it was competent to the Lord Chancellor, at the time of making that decree, to adjudicate between the plaintiff and the lessees as to the validity of the leases: and the cause was remitted, with a declaration and direction to hear it on that question, and to decree, &c.

Jurisdiction.
Rehearing.
Enrolment.
Practice.

A bill seeking to set aside leases, and a sale subject to them, is not multifarious: *semble*.

Whether after sale of property subject to leases, the vendor is entitled to impeach the leases without setting aside the sale: *quære*.

An order having been obtained for a rehearing, upon a motion to discharge it on the ground that the decree was enrolled, the Lord Chancellor ordered the enrolment to be opened, without any application to vacate it; then reheard the cause, and decreed against the leases. HELD that the orders and proceedings were irregular; that although the opening of an enrolment is in the discretion of the Judge, with which a Court of Appeal would not interfere, still that discretion ought to be regulated by precedent and authority.

Upon a rehearing, a party is not bound by untrue recitals, inserted by mistake in the former decree; nor by declining to take a case for the opinion of a Court of Law.

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JOHN FITZMAURICE, being seised in fee of certain lands, called the *Springfield* estate, in the county of *Limerick*, charged with a legacy of 1,000*l.* for his sister, by a settlement dated the 16th of *January* 1732, and made upon his marriage with *Anne O'Dell*, conveyed that estate to trustees, to the use of himself for life, remainder to the first and every other son of the marriage, in tail male, with ultimate remainder to himself in fee; and he reserved a power to charge 4,000*l.* for younger children of the marriage. *Anne* died, leaving two children, *John* and *Mary*, the issue of the marriage; and upon the marriage of *Mary* in 1759, her father, by virtue of the power reserved in the settlement, charged the said estate with the sum of 4,000*l.* and with the sum of 1,000*l.* (the legacy charged for his sister, which he had paid off), and conveyed the estate to trustees for a term of 200 years, upon trust to raise the 5,000*l.* thus charged thereon for his daughter. This charge afterwards became vested in one *John Godley*, for his own benefit. *John Fitzmaurice* (the elder) subsequently purchased other lands in fee simple, called the *Farrihy* estate, in the county of *Limerick*, and *Gurtaheedy* in the county of *Cork*; and after his marriage with his second wife,

Hester Littleton, he, by a settlement dated the 23d of *April* 1763, conveyed the *Farrihy* estate, and all other estates in the counties of *Limerick* and *Cork*, which he had power to dispose of, to trustees, to the use of himself for life, remainder to *Hester* his wife for life: and he thereby also covenanted that after his decease, his said wife should have a life use in all his personal estate. *John Fitzmaurice*, the younger, died in *January* 1775, intestate, leaving an only child, *Anne*; and *John Fitzmaurice*, the elder, died in *March* the same year, also intestate, and without any issue of his second marriage, leaving the said *Anne*, his grand-daughter, his heiress at law, and *Hester* his widow, him surviving.

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In *May* 1775, *Anne Fitzmaurice*, being then a minor, married Sir *Robert Tilson Deane*, afterwards created Lord *Muskerry*. In *June* 1776, in order to terminate differences which had arisen between them and *Hester* the widow of *John Fitzmaurice*, touching her rights under the post-nuptial settlement of 1763, a deed of compromise was executed by the said *Hester* of the first part, Sir *Robert* and *Anne* his wife of the second part, and certain trustees of the third and fourth parts, whereby, after reciting the said settlement of 1763, in consideration of the said *Hester* assuring to the said Sir *Robert* all her right and interest in and to the real and personal estate of her late husband, she and Sir *Robert* conveyed the said *Springfield* and *Farrihy* estates, and the lands of *Gurtaheedy*, to trustees for a term of 99 years, with powers to lease or mortgage the same to secure to the said *Hester* an annuity of 1,083*l.* 6*s.* 8*d.* during her life; and subject thereto, in trust for the use of Sir *Robert* and *Anne* his wife, and her heirs and assigns.

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In 1779, Dame *Anne Deane* having attained the age of 21, and there being then two sons of the marriage, a deed, dated the 25th of *May* in that year, was executed by and between the said Sir *Robert* and *Anne* his wife, of the first part, and *Thomas Lloyd* of the second part, whereby, for assuring the lands therein mentioned and for making a provision for a jointure for *Anne*, and a further provision for the children of the marriage, they, the said Sir *Robert* and *Anne* his wife, granted unto the said *Thomas Lloyd*, his heirs and assigns, the *Springfield* and *Farrihy* estates in the county of *Limerick*, to the use of the said Sir *Robert* for life, without impeachment of waste, remainder to the said *Anne* for life, without impeachment of waste, remainder to *Robert Fitzmaurice Deane*, their then eldest son, for life, and to his first and every other son in tail male; with remainder to their then second son, *John Fitzmaurice Deane*, for life, and to his first and every other son in tail male, with remainder to the use of the third and every other son of Sir *Robert* on the body of the said *Anne* begotten or to be begotten, in tail male, with an ultimate remainder in fee to Sir *Robert*. And it was thereby provided and agreed, “that it shall and may be lawful to and for the said Sir *Robert* from time to time and at all times during his life to lease or demise all or any part or parts, parcel or parcels, of the aforesaid towns, lands, &c. and premises, for any time or term of years or lives and with or without covenants for renewal and in case of the determination of all or any of the aforesaid lease or leases respectively from time to time to make new or other leases thereof in manner aforesaid and with or without any fine or fines as he shall think fit;” and it was also agreed, “that it shall and may be

lawful to and for the said Sir *Robert* to charge and incumber all and singular the said towns, lands, &c. and premises aforesaid, or any part or parts thereof, with any sum or sums for the younger child or children of the said Sir *Robert* begotten or to be begotten on the said *Anne*, in such proportions and manner, and payable at such time or times, as he shall by deed or will appoint." And it was further agreed, "that it shall also be lawful to and for the said Sir *Robert* to raise and levy, by one or more sales or mortgages of all or any part of the premises, any sum or sums of money not exceeding in the whole the sum of 20,000*l.*, or to charge the premises aforesaid therewith, to and for such use and uses as he shall, at any time or times, by deed or will appoint." And by the same deed, Sir *Robert* and his wife covenanted to levy one or more fine or fines before the end of the then next *Trinity* term, unto the said *Thomas Lloyd* and his heirs, of all the said towns and lands, to enure to the uses of said settlement. On the back of the deed there was a writing signed and sealed by the said Sir *Robert* and *Anne* his wife, in the following words: "It was agreed between the parties within mentioned, previous to the execution of the within deed, that the within-named *Robert F. Deane* and *John Thomas F. Deane*, and every other child of said Sir *Robert Tilson Deane* and Dame *Anne* his wife, who shall, under the limitations within mentioned, be possessed of the premises within mentioned or any part thereof, to * make leases of the whole or any part thereof, for any term not exceeding three lives or thirty-one years, provided such lease be made to commence in possession, and that the best improved yearly rent that can be had for the same at the time of making such lease, be reserved thereby,

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and that no fine or other consideration shall be taken for or on account of the making thereof."

In *Trinity* term, 1779, Sir *Robert* and *Anne* his wife, in pursuance of their covenant, levied a fine of the lands comprised in said settlement, to the use thereof. The lands of *Gurtaheedy* were not included in the settlement or fine; they, as well as the *Springfield* and *Farrihy* estates, were Dame *Anne's* property in fee simple.

By indenture of lease dated the 26th of *August* 1779, Sir *Robert* and Dame *Anne* his wife, in consideration of 1,000 *l.* demised to *William Sheehy* for the term of 999 years, at the rent of 20 *l.*, part of the *Springfield* estate described as the lands of *Rosnerilane*, containing 98 acres, and other part of the lands of *Springfield* (subject to a lease made of the latter on the 28th of *February* 1746, by *John Fitzmaurice* to *Isaac Howell*, for three lives at a rent of 40 *l.* 3 *s.*); and Sir *Robert* covenanted for himself and his wife, their heirs, executors, &c., to levy one or more fine or fines unto the said *William Sheehy*, his executors, &c., of all the premises thereby demised.

By indenture of lease dated the 28th of *October* 1779, Sir *Robert* and *Anne* his wife, in consideration of a sum of 2,000 *l.*, demised to *Roger Sheehy*, the younger, the lands of *Clonmore*, another part of the *Springfield* estate, and containing 450 acres, for a term of 999 years, at a rent of 50 *l.* This lease contained permission to the said lessee, his executors, &c., during the demised term, "to graff, cut, and burn the soil and surface of all or any part of the lands thereby demised, without incurring or being subject or liable to any penalty or forfeiture whatsoever for the same, notwithstanding the several Acts of Parlia-

ment in force in *Ireland*, to prevent the practice of burning land:" And it also contained a clause empowering the said lessee, his executors, &c., to quit and surrender the demised premises at the end of every year of the said term, upon giving six months notice in writing; and also a covenant on the part of Sir *Robert* and wife, to levy one or more fine or fines to the said *Roger Sheehy*, his executors, &c., of all the said lands, for the more effectual confirming the said demise.

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By indenture of lease dated the 14th of *June* 1780, Sir *Robert* and *Anne* his wife, in consideration of a sum of 5,708*l.*, demised to *Roger Sheehy*, the elder, other parts of the lands of *Springfield* and *Farrihy*, containing together about 630 acres, all situated in the county of *Limerick*; and also the lands of *Gurta-heedy*, containing 17 $\frac{1}{2}$ acres, situated in the county of *Cork*, subject nevertheless to remainders of unexpired terms of different leases then subsisting, and set out in a schedule annexed to said lease; To hold the same for the term of 999 years, at the rent of 50 *l.* without impeachment of waste, and with power to the said lessee, his executors, &c. to cut, fell, and carry away all timber and other trees then growing, or which thereafter should grow on the said demised premises, and to graff and burn any part of said premises as often as they or he should think proper. The schedule referred to specified five leases for lives of different portions of said lands as subsisting at the date of the said indenture, all which were executed previous to the settlement of 1779. The rents reserved by them were greater than the rent reserved by this indenture. This as well as the aforesaid leases contained covenants on the part of Sir *Robert* and his

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 RRY. wife, to levy fines to the lessees for confirming the said demises; but it did not appear that any fines were ever levied. They also contained the usual clauses of entry and distress, &c., and a reservation of the royalties. All the lands demised by the three indentures, except the lands of *Gurtaheedy*, were lands comprised in the settlement of the 25th of *May* 1779. The said lessees entered into possession of the premises respectively demised to them, and they or their representatives continued in the undisturbed possession for near 40 years. The interest in the second lease (28th of *October* 1779) became vested in the two Appellants, *Edward* and *John Sheehy*; the interest in the first became vested in the Appellants *W. J. Sheehy* and his son *Bryan Sheehy*, and a moiety of the interest in the third became vested in the Appellants *Anne Westrop* and her son *T. J. Westrop*.

The sum raised by Sir *Robert Tilson Deane*, by means of fines on these and on two other leases, each for 999 years, to one *Furlong* and one *Heffernan*, of the lands comprised in the said settlement, amounted altogether to 10,208 *l*.

By a deed dated the 29th of *April* 1780, reciting the settlement of 1779, and the power thereby given to Sir *Robert* to raise by sale or mortgage any sum not exceeding 20,000 *l*., he mortgaged the *Springfield* and *Farrihy* estates, subject to the said leases, to *St. John Chinnery*, for a sum of 6,000 *l*. Sir *Robert* was created Lord *Muskerry* in 1781; and by a deed dated the 7th of *April* 1783, he executed a further mortgage to *St. John Chinnery* of the said estates, subject as aforesaid, for a sum of 4,500 *l*.

The annuity to *Hester Fitzmaurice*, under the deed of *June* 1776, having become largely in arrear, she

filed a bill in Chancery in *February* 1780 (afterwards amended), against Lord and Lady *Muskerry* and their said sons and the lessees in the several leases before mentioned and the person in whom the charge for 5000 *l.* was then vested and others, praying that the leases might be declared fraudulent and void as against her, and that an account might be taken of the sum due to her on foot of her annuity, and that the same might be raised by sale or mortgage of the lands comprised in the trust term created for securing the said annuity. *Hester Fitzmaurice* died in *June* 1790, and thereupon Lord *Westcote*, her executor, revived the cause and filed an amended bill in 1792, making *Broderick Chinnery*, who was the personal representative, devisee, and heir at law of *St. John Chinnery* the mortgagee, a party, and putting in issue the said two deeds of mortgage for 6,000 *l.* and 4,500 *l.* : and by further amendment in 1793, *William Fitzmaurice Deane*, third son of Lord and Lady *Muskerry*, was made a party to the suit. All the defendants, except Lord and Lady *Muskerry* and their sons, put in answers, and in *December* 1797 there was a decree of reference to the Master, to take an account of the sum due to the plaintiff, and an account of all prior and subsequent incumbrances.

In *January* 1802 the Master made his report, finding that 10,819 *l.* 1 *s.* 8 *d.* was due to Lord *Westcote* as representative of *Hester Fitzmaurice*, the principal sum of 5,000 *l.* only due to *J. Godley* on foot of the charge created by the settlement of *May* 1759, and the sum of 15,430 *l.* 0 *s.* 9 *d.* to *B. Chinnery*, for principal and interest on the said mortgages.

In *November* 1802, the cause came to be heard, on the report and merits, before Lord *Redesdale*, then Lord

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Chancellor of *Ireland*, who decreed that the sum of 10,819 *l.* 1 *s.* 8 *d.*, found due to Lord *Westcote*, should be raised by mortgage of the estates comprised in the trust term created by the deed of *June 1776*, and that the trustees thereof should execute mortgages of the remainder of the term to a trustee, to be named by Lord *Westcote*; and he also declared that the said several leases to the *Sheehys*, *Furlong*, and *Heffernan*, were fraudulent and void, as against *Hester Fitzmaurice* and her representative, and that the full and fair rents for the estates discharged from the leases ought to have been paid from time to time to the receiver appointed in the said cause in 1784, from the time of his appointment; and he referred it to the Master to set fair rents on the estates comprised in said leases from year to year, and to take an account of what remained due for such rents after giving credit to the tenants for the sums paid by them to the receivers; and his Lordship declared that, in case the said tenants should redeem the mortgage to be so made for raising the arrears of the annuity, by payment of what should be found due for rents beyond the rents reserved in their respective leases, or by payment out of their own money, they should be entitled to stand in the place of Lord *Westcote*, for so much as they should pay beyond the rents reserved by their respective leases.

While these proceedings were pending in the Court of Chancery, *B. Chinnery*, in the name of his brother *St. John Chinnery*, filed a bill (in *November 1784*) in the Court of Exchequer in *Ireland*, against Lord and Lady *Muskerry*, their two sons and others, to foreclose the mortgages for 6,000 *l.* and 4,500 *l.* *St. John Chinnery* died in 1787 without issue, leaving his said brother his heir-at-law, whom he also ap-

pointed his sole residuary devisee and executor. He revived the cause, and a decree was made therein in 1791, referring it to the Chief Remembrancer to take an account of the sum due on the mortgages; but before any further proceedings were had in that cause, the decree of 1802 was pronounced in the Chancery cause.

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By a deed dated the 11th of *December* 1802, Lord *Westcote*, in consideration of a sum of 4,000*l.*, assigned to *B. Chinnery* the debt of 10,819 *l.* 1*s.* 8*d.*, with the benefit of the Chancery decree of *November* 1802: and by an indenture of the same date, the trustees of the term of 99 years, created by the deed of *June* 1776, to secure the annuity to *Hester Fitzmaurice*, by the direction of Lord *Westcote*, and in pursuance of said decree, mortgaged the lands comprised in said term to *B. Chinnery*, his executors, &c. Having thus become assignee of Lord *Westcote*'s debt, under the decree of *November* 1802, *B. Chinnery* entered into agreements with the tenants under the said leases, and he thereby agreed to accept 1,500*l.* a year from them until the sum due to Lord *Westcote* should be paid, and the tenants respectively paid that stipulated sum, and also kept down the interest on the 5,000*l.* charge.

In 1804, *B. Chinnery* revived the Exchequer suit, and having by supplemental bill stated the decree in Chancery, and the assignment to him of Lord *Westcote*'s interest &c., also stating the death of Lord *Muskerry*'s eldest son, and making his third son a party defendant, he obtained a decree to account, in *February* 1806. In 1807 the Chief Remembrancer made his report under this decree, and a sum of 20,085*l.* 7*s.* 9½*d.* was reported due to *B. Chinnery* on foot of the mortgages executed to *St. John Chin-*

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nery, and also 10,093 *l.* 4 *s.* 4 $\frac{1}{2}$ *d.* as assignee of Lord *Westcote*, and 5,000 *l.* was reported due on foot of the charge formerly vested in *Godley*, by whom the same had been assigned to *B. Chinnery* pending the cause. In *February* 1807, this cause was heard on the report and on the merits, when a decree was made for a sale of the *Springfield* and *Farrihy* estates, for payment, with interest and costs, of the sum reported due on foot of the said mortgages, subject nevertheless to the debts decreed due to *Godley* and Lord *Westcote*, and to the remedies for the recovery thereof, pursuant to the decree of *November* 1802; and also subject to the several leases to the *Sheehys*, *Heffernan*, and *Furlong*.

In 1808, *B. Chinnery*, who had been some time before created a baronet, died, having bequeathed to his two sons, *St. John* and *Richard Boyle Chinnery*, minors, the sums due on foot of said mortgages and charge, and on foot of Lord *Westcote*'s demand; and appointed his widow, *Alice Chinnery*, his executrix, who proved his will, and revived the suit in the Court of Exchequer. The Chief Remembrancer, pursuant to the decree of *February* 1807, in the Exchequer, set up the *Springfield* and *Farrihy* estates for sale, subject to the 5,000 *l.* charge and Lord *Westcote*'s debt, and to the said several leases to the *Sheehys*, *Heffernan*, and *Furlong*; and in *November* 1810, Dame *Alice Chinnery* became the purchaser, and in *May* 1812 the estates were accordingly conveyed to her by a deed of conveyance, purporting to be made between the Chief Remembrancer, Lord and Lady *Muskerry* &c., but it was executed by the Chief Remembrancer only.

Robert Lord *Muskerry* died in *July* 1818, leaving *Anne*, Lady *Muskerry*, his widow and executrix, and two sons, the Hon. *John Thomas F. Deane*, who

thereupon became Lord *Muskerry*, and the Respondent, then the Hon. *Matthew F. Deane*, his only surviving children.

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The original bill in the cause, out of which this Appeal arose, was filed in *May* 1819 by *John Thomas Lord Muskerry* and the Respondent, and their mother. *John Thomas Lord Muskerry* died in 1824 without issue, whereupon the Respondent became Lord *Muskerry*, and in 1826 he, having revived the suit, filed an amended bill against Dame *Alice Chinnery*, the children of Sir *B. Chinnery*, and the said lessees or their representatives, which, after stating a variety of dealings and transactions between *Robert*, first Lord *Muskerry*, and Sir *B. Chinnery*, in addition to the several matters before mentioned, charged (among other things) that the said several leases were not authorized by the leasing power in the settlement of 1779, but were made in fraud thereof, because the former and annual rents were reduced, and some of the lands thereby demised were subject to prior leases then unexpired, and the lessees were dispunishable for waste &c.; that Lord *Muskerry* having raised 10,208 *l.* by taking fines upon the leases, and also 10,500 *l.* by the mortgages to *St. John Chinnery*, had exceeded his power to charge under the said settlement, which limited him to 20,000 *l.*; and that said mortgages having been made subject to said fraudulent leases, were contrary to the intent and meaning of the power; that the proceedings and accounts taken in the Exchequer cause were fraudulent and erroneous, and that if due credits had been given, nothing would have been found due on foot of said mortgages; that the decree in said cause was also erroneous in directing a sale for payment of subsequent mortgages

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subject to a prior charge and other prior incumbrances, without providing for the payment thereof out of the produce of the sale; and the bill, after impeaching the said decree on several other grounds, prayed that the said leases might be declared not to have been warranted by the leasing power in the said settlement, and might be decreed fraudulent and void as against the plaintiff (the Respondent) claiming in remainder under the said settlement, and that the mortgages to *St. John Chinnery* might be declared not warranted by any of the powers in said settlement, and might be deemed fraudulent and void, and that the final decree in the Exchequer might be declared to have been fraudulently obtained, and that accounts might be taken of what was due to Dame *Alice Chinnery*, as representative of Sir *B. Chinnery*, on foot of her demands as assignee of Lord *Westcote's* and *Godley's* demands, and that in taking such accounts, such sums only should be allowed as Sir *B. Chinnery* actually and *bonâ fide* paid as assignee of Lord *Westcote* and *Godley* respectively; and in case the said mortgages, or either of them, should be deemed a subsisting lien on said estates, then that accounts might be taken of the sums due on foot thereof, and that in taking such accounts, such sums only should be allowed as were actually and *bonâ fide* paid for the same, and that upon payment thereof, plaintiff might be decreed entitled to redeem said mortgaged premises, and the same should be reconveyed accordingly; and that an account might also be taken of the sums received by Sir *B. Chinnery* or his representatives, or which without wilful default he or they might have received out of the *Springfield* and *Farrihy* estates, &c. &c.

The defendants, the *Chinnerys*, in their answer, in-

sisted that the said mortgages were in due execution of the power in the settlement to raise 20,000 *l.*, and also insisted on the validity of the final decree in the Exchequer cause, by which Dame *Alice Chinnery* had become the purchaser of the *Springfield* and *Farrihy* estates.

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The Appellants also put in their several answers, and insisted on the validity of the leases, and that the rents reserved in them respectively were the reasonable and just yearly value of the lands demised, allowances being made in respect of the fines paid on them by the lessees; and that all prior leases of the same, except the lease to *Isaac Howell*, were surrendered before the leases in question were granted, and that they were in due execution of the power contained in the settlement of 1779, and their validity was not affected by the subsequent mortgages.

Lady *Muskerry*, Dame *Alice Chinnery*, and several of the parties died, pending the proceedings, and bills of revivor and amendment were filed as occasion required.

The cause was heard before Lord *Plunket* on the 21st, 22d, 23d, &c. and 29th of *November* 1832; and his Lordship on the last-mentioned day directed that the parties might be at liberty to submit a case for the opinion of the Court of Common Pleas upon the question, “Whether the leases dated respectively the 26th of *August* and 28th of *October* 1779, and the 14th of *June* 1780, and made by Sir *Robert Tilson Deane*, afterwards created Baron *Muskerry*, and Dame *Anne* his wife, to *W. Sheehy*, *R. Sheehy* the younger, and *R. Sheehy* the elder, respectively, or any or either, and which of them, were or was warranted by any power contained in the deed dated the 25th of *May* 1779?” And all further directions were reserved until the opinion of the Court of Common Pleas should be had.

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A case was framed pursuant to that order; and the Judges of the Court of Common Pleas certified, in *February* 1834, that the said leases were not warranted by any power contained in the deed of settlement of the 25th of *May* 1779.

The cause came on for hearing before Lord Chancellor *Sugden* in *February* 1835, upon that certificate, and for further directions. During the hearing counsel informed the Court that a compromise was agreed upon between the Respondent and the committee of the defendants, the surviving children of Sir *B. Chinnery*, who were lunatics, and that a petition was to be then presented to his Lordship, on behalf of the lunatics, for a reference to the Master to inquire whether the proposed compromise would be for the benefit of the lunatics (*a*). The only question then left to the Court being as to the legal validity of the leases, the Lord Chancellor, for the better adjudication of that question, called to his assistance the Lord Chief Justice of the Court of Common Pleas and the Lord Chief Baron. The point was elaborately argued before them sitting with the Lord Chancellor, but his Lordship did not ask them to deliver their opinions in court, being himself clearly of opinion that as the bill had been filed to impeach the mortgages and the sale, and as Lord *Muskerry* had withdrawn from the consideration of the Court the question as to their validity, he had no jurisdiction to decide on the validity of the leases, and that Lord *Muskerry* could not impeach them without impeaching the sale under the Exchequer

(*a*) The Lord Chancellor on the same day made an order of reference to the Master on the petition as prayed. The Master, by his report on the 8th of *April*, found that the compromise (which was, that the *Chinnerys* should reconvey the mortgaged premises to the Respondent for 24,000 *l.*, principal and interest on the two mortgages and charge) was for the benefit of the lunatics.

decree. His Lordship, at the same time, with a view to prevent further litigation between the parties, said the impression on his mind was, that the leases were valid, as being authorised by the general terms of the power in the settlement, and that the Lord Chief Baron concurred with him in that construction (b).

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By his Lordship's decree, after reciting as therein recited, and that plaintiff (the Respondent) "by his counsel, in open court, having waived insisting on any relief as sought by his bill, in respect of the said final decree pronounced by the Court of Exchequer in said bill mentioned, and the said sale in pursuance thereof, &c., and it appearing that under the said decree in the Court of Exchequer the said lands, &c. were sold to the purchaser, Dame *Alice Chinnery*, subject to said indentures of lease of the 28th *October* 1779 and 14th *June* 1780," it was ordered and adjudged, &c. that the plaintiff's bill, &c. should be dismissed with costs as against the defendants, *E. Sheehy*, &c., the representatives of the lessees of the leases of the 28th of *October* 1779 and 4th *June* 1780 (the lessees who appeared at the hearing), save as to the costs incurred in respect of the said proceedings in the Court of Common Pleas, as to which it was declared that all parties should abide their own costs.

On the 8th of *May* 1835, the Respondent presented a petition to Lord *Plunket*, who had then succeeded Sir *Edward Sugden* as Lord Chancellor of *Ireland*, praying for a rehearing of the cause, for the reasons stated in the petition (c), and his Lordship on the same day ordered the cause to be set down to be reheard.

The Appellants, *Edward* and *John Sheehy*, subse-

(b) Lloyd & G. Cas. Temp.
Sir Edw. Sugd. 185.

(c) Lloyd & G. Cas. Temp.
Lord Plunket, 182.

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quently moved his Lordship to discharge that order, as having been obtained by suppression of the fact that the decree was inrolled. Affidavits were filed for and against that motion. The affidavit on behalf of the *Sheehys* was made by their solicitor, who therein deposed that the counsel for the plaintiff, at the hearing of the cause, declined calling on the Court for any relief against the *Chinnerys*; that on the 18th of *April* the inrolment of the decree of dismissal was lodged by his Six Clerk in the Rolls' Office, pursuant to the docket signed by Lord Chancellor *Sugden* on the 14th of *April*; and the said decree was, as deponent was advised and believed, duly inrolled. The affidavits on behalf of Lord *Muskerry*, made by his solicitors, stated, that after said decree of the 12th of *February* 1835 was pronounced, they received instructions from him to enter a *caveat* against the inrolment thereof; and that, on making inquiries at the Bill Office with that view, they discovered that the solicitor for the defendants (the *Sheehys*) caused engrossments of the said decree to be lodged in the Rolls' Office; and on inquiry there, the Deputy-keeper of the Rolls said he did not consider the engrossment so lodged to be an inrolment, as it was a transcript of the decree in a short form, as directed by the new rules, which, he said, did not apply to inrolments of decrees, or alter the practice in that respect, and therefore he would not give a certificate of the decree being inrolled, but that a parchment copy of it, signed by the Chancellor, was lodged in the office: and the Master of the Rolls, whom the Deputy-keeper consulted on the point, was of his opinion. These deponents also stated that the allegation in the affidavit of the solicitor for the *Sheehys*, and the statement in the said decree, that plaintiff's counsel in open court

waived praying any relief against the *Chinnerys*, was not founded in fact.

The Lord Chancellor, after hearing counsel on the matter, made an order on the 28th of *May* 1835, "that the said engrossment be opened, for the purpose of rehearing the cause."

The cause was accordingly reheard by his Lordship, and on the 11th of *June* 1835 a decretal order was pronounced, which recited and decreed, among other things, as follows: "And it appearing to the Court that the recital contained in the said decree of dismissal of the 12th of *February* 1835, stating that the plaintiff (the Respondent) by his counsel in open court had waived insisting on any relief as sought by his bill, in respect of the final decree pronounced by the Court of Exchequer, &c., and the sale in pursuance thereof, was erroneously inserted therein, being unfounded in fact and not warranted by any statement or waiver made on the part of Lord *Muskerry*; and upon reading the order of reference of the 5th of *February* 1835, made on the petition in the matter of *Richard B. Chinnery, Maria and Louisa Chinnery*, lunatics, and inasmuch as the subject of that reference was depending at the time of pronouncing the said decree of dismissal; and upon reading the Master's report of the 6th of *April* 1835, made in pursuance of the said order of reference, and inasmuch as the defendants, the *Chinnerys*, are now parties before the Court in this cause, insisting on their rights by their committee and by their counsel; and upon reading the order made the 8th of *May* 1835, on the petition of the plaintiff (the Respondent) for a rehearing of this cause so far as regards the said decree of dismissal: it is this day ordered, &c. that the said decree be reversed. And the Court proceeding to hear

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this cause upon further directions against the defendants, the *Chinnerys*, upon reading the Master's report of the 6th of *April* last, made in pursuance of said order of reference of the 5th of *February* 1835 ; it is ordered, &c. that the said report do stand confirmed as between the plaintiff and the *Chinnerys*, and that the compromise therein set forth be carried into effect : and accordingly it is further ordered that the said plaintiff is entitled to redeem the mortgages of the *Springfield* and *Farrihy* estates, on payment of the sum of 24,000 *l.* to the defendant, *R. S. Ball*, as committee of said lunatics, and personal representative of the late Sir *B. Chinnery* and Dame *Alice Chinnery* respectively, with interest from the 1st of *February* 1835 until paid, &c. ; and that all necessary parties join in a reconveyance of the said premises to the plaintiff, discharged of the said mortgages : And in default of payment of the 24,000 *l.* within the time named, it is ordered, &c. that the plaintiff's equity of redemption be absolutely foreclosed, and that the Master set up and sell the mortgaged premises or a competent part thereof, and out of the money arising from the sale that the said sum of 24,000 *l.* with interest, or so much thereof as shall remain due, be paid : And it is further ordered, &c. that the plaintiff, as administrator of the Dowager Baroness *Muskerry*, release the said *R. S. Ball*, and the said lunatics and their estates, from all claims and demands whatsoever for arrears of dower, and also from all demands relating to the rents of the mortgaged premises up to the 1st of *February* last ; and that the committee of the said lunatics on their behalf, and all other necessary parties, release the plaintiff and his estates from all claims and demands whatsoever of the said lunatics up to that day, save as far as relates to the mortgaged debt

and as between the plaintiff, and the said lunatics and their said committee, that each of the parties abide their own costs; and as between the several other parties, that the said cause stand over to be further heard, with liberty to all parties to adopt such defences as they shall be advised, arising out of said compromise, and the decree now pronounced in pursuance thereof."

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The cause was accordingly further heard, on the question of the validity of the leases, on the 12th of *June* and following days; and on the 13th of *July* 1835, Lord *Plunket* delivered his judgment on that question, declaring the leases not to be authorised by any power in the settlement of 1779, and pronounced a decree as follows:—"Upon reading the case submitted for the opinion of the Court of Common Pleas, and the certificate of the learned Judges of that Court thereon, setting forth that, &c., and they were of opinion that the leases in the pleadings mentioned, dated respectively the 26th of *August* 1779, &c. were not warranted by any power contained in the deed of settlement dated the 25th of *May* 1779; and the defendants the lessees (the Appellants), by their counsel in open court, declining to accept an offer made by the Court, to send the said case for the opinion of the Court of King's Bench, &c. &c.: it is ordered and decreed, that the said decree of the 12th of *February* 1835 be reversed, and it is declared that the insertion therein of the waiver therein recited was not warranted by the facts. And it is further decreed and declared, that the said three leases, dated respectively the 26th of *August* 1779, the 28th of *October* 1779, and the 4th of *June* 1780, made by the said Sir *R. Tilson Deane*, afterwards created Baron *Muskerry*, and Dame *Anne*, his wife, to *Wil-*

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liam Sheehy, &c. were not, nor was either of them valid at law, or warranted by any power contained in the deed of settlement of the 25th of *May* 1779, and that there was no ground for sustaining any or either of them on equitable principles: and the said leases being invalid at law, and not sustainable on equitable grounds, it is further ordered and declared that the same are void, and that they be and are hereby set aside, and that an injunction do forthwith issue to put the plaintiff into possession of the premises comprised in the said leases respectively (*e*)."

The Appellants, by their petition of appeal, prayed that the orders for rehearing, and for opening the inrolment of the decrees, made respectively on the 8th and 28th of *May* 1835, and also the last-stated decree of the 13th of *July* 1835, be reversed or altered.

Mr. *Pemberton* and Mr. *J. Russell*, for the Appellants:—The order for rehearing was obtained by withholding from the Court all knowledge of the decree of dismissal having been inrolled. On that ground the Appellants moved to discharge the order; but Lord *Plunket*, without inquiry into the fact or manner of inrolment, and without any application to vacate it, spontaneously ordered the inrolment to be opened for the purpose of the rehearing. Both these orders are clearly irregular. One effect of inrolling a decree is to prevent a rehearing; and an inrolment cannot be opened except for fraud or surprise, or some irregularity: *Kemp v. Squire*(*f*), *Charman v. Charman*(*g*), *Robinson v. Newdick*(*h*), *Stevens v. Guppy*(*i*), *Barnes v.*

(*e*) Lloyd & G. Cas. Temp.
 Lord Plunket, 206.

(*f*) 1 Ves. sen. 205.

(*g*) 16 Ves. 115.

(*h*) 3 Meriv. 13.

(*i*) Turn. & R. 178.

Wilson (*k*), *Balguy v. Chorley* (*l*), *Whitaker v. Leach* (*m*), *Richards v. Wood* (*n*), *Wardle v. Carter* (*o*). There was neither fraud nor surprise in the inrolment of this decree. The party affected by it might have prevented the inrolment by petition for rehearing, presented in due time, or might have suspended the inrolment by *caveat* for a month (*p*). Instead of doing either, he acquiesced in the decree and paid the costs, never contemplating a rehearing until the learned Judge who made the decree of 1832, again became Lord Chancellor.

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But it was alleged that the Deputy-keeper of the Records in *Ireland* did not deem the inrolment sufficient, because the engrossment did not recite all the proceedings in the cause in the old form; and the new orders of the Court of Chancery in *Ireland*, for dispensing with recitals, did not, in his opinion, apply to inrolments. The best answer to that objection is, that Lord *Plunket* treated the inrolment as regular by ordering it to be opened. Besides, the affidavits of the solicitors for both parties showed that there was an actual inrolment before the *caveat* was tendered.

If, then, the order to rehear was irregular, the decree pronounced on the rehearing cannot be allowed to stand. But that is not the only objection of form to this decree: it contradicts an averment of a fact in the former decree, asserting that that decree contained a false statement. That was a course of proceeding quite unprecedented. It is not competent for a Judge to strike out of the record, much less to contradict, a statement, signed by his predecessor, of what took place before the latter in open court. At law, no

(*k*) 1 Russ. & M. 486.

(*l*) 1 Myl. & K. 640.

(*m*) 2 Smith's Pra. 8.

(*n*) 2 Smith's Prac. 9.

(*o*) 1 Myl. & C. 283.

(*p*) Bea. Ord. 308.

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averment, nor pleading, nor evidence, nor argument, is allowed against a record, every part of which, as long as it remains on the files of the court, must be taken to speak absolute verity: *per* Lord *Ellenborough*, in *Ramsbottom v. Buckhurst* (q). The same rule holds in equity. The record of Sir *Edward Sugden*'s decree remains unaltered. The statement contained in it, of a waiver of relief against the *Chinnerys*, was not only true, but was admitted by the proceedings before Lord *Plunket*, whose decree, notwithstanding, declares that it contains a false statement.

Another objection, not only of form but also on the merits, to Lord *Plunket*'s decree—an extraordinary decree, with two dates—is, that without containing a declaration that the Exchequer decree of foreclosure, and the sale in pursuance of it, were void, it proceeded to declare, on the prayer of the vendor, that the leases were void, as to some of the defendants, and, as to the other defendants, it directed the cause to stand over, with liberty to them to make such objections to that declaration as they might be advised. This part of the decree would, if allowed to stand, go to the extent of establishing a rule of equity, that a person who sold all his estate had still a reserved interest in respect of leases, subject to which the purchaser bought the estate, and which, therefore, the purchaser could not himself impeach. Was it open to the vendor to impeach them in the absence of the purchaser, and deprive him of the security of solvent tenants? No such equity is recognised in the courts in *England*: something partaking of that doctrine appears in a case said to have been decided in *Ireland*; *Maguire v. Armstrong* (r). One of the objects of the bill in the

(q) 2 Maule & S. 268.

(r) 2 Ball & B. 538.

present case was to set aside the Exchequer decree and the sale, and then to leave it open to the reversioner to impeach the leases. That was the proper course; but this decree gives a different relief, for it sets aside the leases at the suit of the vendor, and sets them up against the purchaser, contrary to the scope and prayer of the bill. That was the irregularity which Sir *Edward Sugden* foresaw when he found that by the compromise between the Respondent and the *Chinnerys*, the consideration of the question as to the validity of the sale was withdrawn. He found, after hearing argument on the point and giving it due consideration, that, in the absence of the purchasers of the estate, he had no jurisdiction to give any decision on the leases, and he therefore dismissed the bill. But he at the same time expressed his clear opinion that the leases were warranted by the power (s), and in that opinion the Chief Baron concurred; and the Chief Justice of the Common Pleas said he was impressed with the argument, although he had signed the Common Pleas certificate that the leases were not warranted (t). There are cases in which purchasers succeeded in setting aside leases granted anterior to their purchases; but it is quite new to hold, as Lord *Plunket* did (u), on the authority of *Maguire v. Armstrong*, (which his Lordship said was supported by the case of *Taylor v. Stibbert*), that a vendor, after parting with his whole interest, should impeach leases of the property so parted with, and to declare the tenants to be trustees of an equitable interest reserved in him against the purchaser. It would seem, if such an equity were allowed to exist, that no one can sell his estate

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(s) Lloyd & G. Cas. Temp. Sir E. Sugd. 220.

(t) 2 Sugd. Pow. 359, and App. 620, (6th Edit.)

(u) Lloyd & G. Cas. Temp. Lord Plunket, 196.

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out and out. That doctrine was not countenanced by *Taylor v. Stibbert* (x). The lessees in this case had a right to set up the sale to the *Chinnerys* as a protection against the claim of the Respondent to impeach them. He, instead of proving that the estates were improperly mortgaged, and that the Exchequer decree and sale were wrong, admitted them to be right by agreeing to give 24,000 *l.* to the purchasers for a reconveyance, thereby withdrawing the question between him and them from the consideration of the Court. The validity of the leases, except as against prior incumbrancers, was recognised not only by the Exchequer decree, but also by Lord *Redesdale's* decree in the Chancery suit in 1802; and to the benefit of that decree the lessees are entitled in respect of the sums of money paid by them in pursuance of it, and of the agreement into which they entered with Sir *B. Chinnery* in 1803.

Mr. *Knight Bruce* and Sir *William Follett*, (Mr. *C. Beavan* with them), for the Respondent:—The appeal against the decree is not sustainable on the merits, and it should not be allowed on the alleged miserable ground of irregularity of the previous orders. The consequence of deciding that the rehearing was irregular would be to leave the Respondent remediless, inasmuch as by the Standing Orders of the House (y) an appeal against the decree of dismissal of *February* 1835, would be now too late. But the order to rehear was not irregularly obtained, as the decree had not been inrolled according to the established practice of the Court; at all events it was very doubtful whether the new general orders of the Court of Chancery in *Ireland* had changed that

(x) 2 Ves. jun. 437. (y) See Order No. 118, *ante* Vol. VI. p. 976.

practice, and this was therefore a fit case for the exercise of the discretionary power of the Court to open the inrolment. A Court of Appeal is never inclined to interfere with such exercise of the discretion of the Court below. The Keeper of the Records must be allowed to be the proper judge of the practice in his own office, and in this matter he had the sanction of the Master of the Rolls. The Appellants have never obtained a certificate of the inrolment. The Keeper of the Records refused to grant any, being most positive in his opinion that the short engrossment of the decree left with him was not an inrolment. A *caveat* was lodged before that defect could be corrected.

The decree of dismissal did not extend to all the Appellants: some of them did not appear at the hearing; it is therefore incompetent to them to object to the opening of the inrolment, and that incompetency applies to all the Appellants, in consequence of the misjoinder in this appeal. An objection of form on one side, may be justly met by a like objection on the other.

The objections to the form of Lord *Plunket's* decree are, first, that it contained a contradiction of a statement of fact in the decree of dismissal. And it has been argued, that any statement inserted in a decree, and appearing on the record, cannot be contradicted. But if Lord *Plunket* was right in rehearing the cause, then there was no final decree, and consequently no record. There was a final record in the case of *Ramsbottom v. Buckhurst* (2). Suppose a decree recited the consent of counsel, and that no such consent was given, would it not be open to the parties affected to question the statement and correct the error? It would be extremely unjust to hold that a party may not

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(2) 2 M. & Selw. 268.

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questions in consequence of the arrangement, although question the recital of a waiver of relief in a decree where there was no waiver. From a comparison of the affidavits of the solicitors on both sides, with the notes of the Registrar, it is evident that the recital of waiver of relief against the *Chinnerys*, as stated in Sir *Edward Sugden's* decree, was not warranted by what the Respondent's counsel stated, or by the state of the proceedings before the Court. Nothing that took place could bar the relief sought against the Exchequer decree and sale. They were both properly impeached by the Respondent, on the authority of recent decisions of this House: *Mullins v. Townsend* (a), *Earl of Bandon v. Becher* (b). The lessees could not be in any manner affected by that sale; they were strangers to it, and had no right to interfere in any arrangement between Lord *Muskerry* and the *Chinnerys*. By that arrangement, in effect, the *Chinnerys* granted to Lord *Muskerry* the relief which his bill prayed against them; they submitting to a decree of redemption. That arrangement was only in progress, and not concluded until more than two months after Sir *Edward Sugden* pronounced his decree, in which he declared that, in consequence of the question regarding the sale being withdrawn by the arrangement, he could not decide the questions regarding the leases. All the parties interested certainly assented to the proposed arrangement. The Lord Chancellor *fiated* the petition for a reference to the Master, to inquire whether that arrangement would be beneficial to the *Chinnerys*: he afterwards summoned the Common-law Judges to hear with him arguments of counsel on the questions affecting the leases; yet he most unaccountably declares in his decree that he cannot decide these

(a) 2 Dow & Clark, 430.

(b) 3 Clark & F. 479.

the arrangement was not more complete at the date of the decree than on the days of the hearing before himself and the Common-law Judges.

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Another objection, which goes to the substance as well as the form of Sir *Edward Sugden's* decree, was the declaration therein that he had not jurisdiction over the questions affecting the leases, in the absence of the parties interested in the sale under the Exchequer decree. One main object of the suit was to impeach the leases. The submission of one set of defendants, the purchasers under the sale, to a decree of redemption, in order to put an end to litigation on that part of the suit, did not affect the relative position of the plaintiff and the other defendants, in respect to the validity of the leases; or if it had any such effect, it was to strengthen the plaintiff's title. The clear understanding of all the parties and their counsel, and of Sir *Edward Sugden* himself, was, that the suit as between the Respondent and the lessees was to proceed, notwithstanding the proposed compromise. Lord *Plunket*, by his decree, put the true construction on the facts as they were stated to him to have taken place, and as they did take place before his predecessor. The technical objections raised against that decree should not be allowed to stand in the way of having the appeal against it heard and decided on the merits.

[We abstain from reporting the arguments of the learned counsel on either side, on the questions as to the validity of the leases,—which occupied the House for four days,—because the House did not give any opinion on the leases, and the arguments on them in the court below, before the Lords Chancellors of *Ireland*, are twice reported, by Messrs. *Lloyd & Goold*, Cas. Temp. Sir *Edward Sugden*, p. 200; and Cas. Temp. Lord *Plunket*, p. 188.]

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The *Lord Chancellor*:—My Lords, so long a time having elapsed since this case was argued, I think it right to enter more minutely into the facts as far as they bear upon two points which were raised in the argument. The first of these points is one of form and practice, being whether it was competent for the Court, in the then state of the proceedings, to pronounce such a decree. In order to come to a conclusion upon this point, it will be necessary shortly to examine the different interests of the parties to the cause.—In 1775, *Anne Fitzmaurice* was seised in fee of the *Springfield* estate, subject to a charge of 5,000*l.* vested in *John Godley*, and in fee absolutely of two other estates, called *Farrihy* and *Gurtaheedy*. She married Sir *Robert Tilson Deane*; and her mother-in-law, *Hester Fitzmaurice*, making a claim upon the estate, it was arranged that she should accept an annuity, charged upon a ninety-nine years' term over all the estates, in full of her demand.

In 1799, a post-nuptial settlement was made of the estates of *Springfield* and *Farrihy*, under which these estates, after life estates to the husband and wife, were limited to the two sons, then living, for life, remainder to their sons in tail male, remainder to any other sons of the settlor in tail; and power was reserved to Sir *R. T. Deane*, of granting leases and of charging the estate with 20,000*l.* This power of leasing he exercised by granting a lease dated the 26th of *August* 1779, now vested in the Appellants, *W. J. Sheehy* and *Bryan Sheehy*; by granting another lease, dated the 28th of *October* 1779, now vested in the Appellants, *Edward* and *John Sheehy*; by granting another lease, dated the 4th of *June* 1780, now vested in the Appellants, *Ann Westropp* and *T. J. Westropp*. He also exercised the power of charging the estate by two mortgages to *St. John Chin-*

nery, one dated the 29th of *April* 1780, for 6,000*l.*, and the other the 7th of *April* 1783, for 4,500*l.*

On the 18th of *November* 1802, a decree was made in a suit instituted to compel payment of the arrears of the annuity secured to *Hester Fitzmaurice* under the deed of the 20th of *June* 1776, the right to which was then vested in Lord *Westcote* by mortgage of the estate charged; and it was by that decree declared that the leases were fraudulent and void as against the charge, and that the tenants were to account for the full value from the year 1784; but the tenants were to be at liberty to redeem the charge, and, as against the estate, to be repaid what they might pay for that purpose either by way of rent or sums advanced by them. This suit was instituted in the Court of Chancery in 1782; and in 1784, *Chinnery*, the mortgagee, filed a bill in the Court of Exchequer to foreclose; and in 1787, a decree was made in the latter suit, merely of reference to take the accounts; and in *December* 1802, soon after the decree in the Chancery suit, Lord *Westcote* assigned to *Chinnery*, the mortgagee, all his interest under that decree. On the 19th of *February* 1807, a decree of foreclosure was made in the Exchequer suit, upon the report of the Deputy Remembrancer, who found a large sum due upon *Chinnery's* mortgage, but subject to the decree in Chancery of 1802, and to the leases, and to another mortgage or charge of 5,000*l.* then vested in *Godley*, but which was afterwards assigned to *Chinnery*. Under this decree, a sale of the *Springfield* and *Farrishy* estates took place before the Remembrancer; and *Alice Chinnery*, in whom the mortgage was then vested, became the purchaser, but subject, according to the decree, to Lord *Westcote's* charge, *Godley's*

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charge, and the leases. In 1812, a conveyance was directed to be made under the purchase, but it was not executed except by the Deputy Remembrancer.

In 1819, a bill was filed in the Court of Chancery in *Ireland*, by the Respondent, then first tenant in tail, and the other parties then interested under the settlement of 1779, impeaching the titles of the mortgagees and of the lessees. In 1832, the cause came to be heard before Lord *Plunket*, who directed a case for the opinion of the Court of Common Pleas, as to whether the leases were warranted by the power contained in the settlement of the 25th of *May* 1779. In *February* 1834, the certificate of the Judges of the Common Pleas was obtained, finding that the leases were not warranted by the power. Before the cause came on for hearing upon this certificate, an arrangement having taken place between the plaintiff (the now Respondent), and the *Chinnerys*, in whom the mortgages and Lord *Westcote's* charge were then vested, the Court was informed that no judgment was required as between the plaintiff and the mortgagees: upon which Sir *Edward Sugden*, then Lord Chancellor of *Ireland*, expressed his opinion, that the plaintiff having waived all relief against the mortgagees, and as to the sale in the Exchequer suit, no judgment could be pronounced as to the leases; and therefore dismissed the bill as against the defendants claiming the several leases. Before this time, that is on the 5th of *February* 1835, one of the parties interested in the mortgages being a lunatic, a reference was made to inquire whether the proposed arrangement would be for the benefit of the lunatic; and after the decree, that is on the 8th of *April* 1835, the Master reported in the affirmative. This decree, according to the case made by the

defendants, was inrolled, but that is denied by the plaintiff.

On the 8th of *May* 1835, an order for rehearing was made as of course; and on the 28th of *May* 1835, upon an application by the Appellants to discharge that order, an order was made to open the inrolment for the purpose of the rehearing.

On the 13th of *July* 1835, Lord *Plunket* pronounced his decree upon the rehearing, carrying into effect the terms of the arrangement, giving to the plaintiff the benefit of the redemption, on payment of the sum agreed to be paid upon account of the mortgages and charges; and, as against the lessees, declaring the leases void, they having declined to take another case for the opinion of the Court of King's Bench.

The appeal is against the orders of the 8th and 28th of *May* 1835, and the final decree of the 13th of *July* 1835. The two orders may be considered together, the question as to both being the regularity and propriety of the order for rehearing; that is, whether under the circumstances the Court was precluded by the inrolment from rehearing the cause.

It appears, from the affidavit of Mr. *Furlong*, the plaintiff's solicitor, that it was a subject of doubt whether there had been, in fact, any inrolment of the decree; the Deputy-keeper of the Rolls having objected to the engrossments left with him, as being merely copies of the decree in the short form, and that he had, therefore, consulted the Master of the Rolls, who was of opinion that they were not to be considered as an inrolment; and therefore he declined to give any certificate of the inrolment, and, in fact, there was not any such certificate. Mr. *Furlong* having received this information, explains the reason of his not having made any application to the Court to vacate the inrolment; but it appears that the de-

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fendants, *Edward* and *John Sheehy*, moved to set aside the order for a rehearing, upon the ground of the decree having been inrolled, whereupon Lord *Plunket* ordered that the inrolment should be opened, for the purpose of rehearing the cause.

There certainly is a want of regularity in this proceeding, which may, perhaps, be accounted for by the doubt which appears to have existed as to whether there had, in fact, been any inrolment; and if the Lord Chancellor was of opinion that under the circumstances there had been no inrolment, or that there was doubt about it; or that, if the inrolment was good, there was sufficient ground for vacating it, he may have thought it right to remove the doubt by his order of the 28th of *May* 1835. The question, however, now is, whether it be necessary to dispose of this appeal upon the ground of this irregularity, and, after all the expense and delay which has been experienced, to send the parties back to commence their proceedings *de novo*, so far as to make it necessary for the Respondent to appeal against the decree of the 12th *February* 1835, instead of deciding any of the questions between the parties upon the Appellant's appeal against the decree of the 13th *July* 1835. A Court of Appeal is always unwilling to adopt such a course, when it is possible to reach any of the merits of the case. In questions respecting the inrolment of decrees, the Court exercises a discretionary power (c); and although such discretion ought to be regulated by precedent and authority, yet the circumstances of this case were very peculiar, and I think that your Lordships will not consider it to be your duty upon this question of form to refuse to entertain the other points in the cause.

(c) See as to effect of inrolment, *Foster v. Cockerell*, ante, vol. 3, p. 456; *Champernowne v. Brooke*, ante, vol. 4, p. 247.

If, then, your Lordships feel at liberty to consider the merits of the decree of dismissal of the 12th *February* 1835, it is material to consider that the decree contains in its recitals the grounds upon which it was founded. It recites that the plaintiff had, by his counsel in open court, waived insisting on any relief in respect to the final decree in the Exchequer, and the sale made in pursuance thereof, and that it appeared that the lands had been sold subject to the leases. It proceeds then to dismiss the bill against the lessees with costs. It is unnecessary to consider whether, if these recitals in the decree, of the plaintiff having waived insisting on any relief in respect to the decree of the Exchequer, and the sale made in pursuance thereof, were consistent with the fact, it would necessarily lead to a dismissal of the bill against the lessees, because it appears to me evident from the proceedings, independently of the affidavits, that the recital must have been inserted from a misapprehension. It is indeed stated in one of the affidavits that it was introduced after the hearing, and this is not contradicted; but upon a rehearing, there can be no reason for binding the plaintiff by this evident mistake by the officers of the Court. The whole transaction proves that the plaintiff's counsel could not have done what the decree recites, because the arrangement with the *Chinnerys* was to be carried into effect by a decree. The proposal was, that the defendants should submit to a decree; and a reference had been obtained to inquire on behalf of one of them, who was a lunatic, whether it would be for his benefit to submit to the proposed decree. Now, from the terms of the recital, it would be inferred that the plaintiff had waived all relief against the decree and sale in the Exchequer; whereas, in fact, the defendant had at

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the time agreed, subject to the inquiry, to submit to a decree in the plaintiff's favour. This having been so arranged, the counsel might naturally have informed the Court that the plaintiff had not to trouble the Court to adjudicate as against the *Chinnerys*; but not because the relief against them had been abandoned, but because the terms of it had been arranged; and this, no doubt, led to the mistake. If this had been rightly understood at the time, I cannot think there would have been a decree of dismissal without any decision upon the merits. A decree so arranged with the *Chinnerys* must have had the same effect as if the Court had pronounced it; with this difference only, that the lessees might themselves have disputed the plaintiff's title to any interest in the estate. It was not competent for any of the defendants at the hearing to insist that the relief prayed against the *Chinnerys* and against the lessees had been improperly joined in one suit; and if not, and if the plaintiff had shown a good title to relief against the *Chinnerys*, and had so established an interest sufficient to entitle him to dispute the validity of the leases, the Court could not have declined to adjudicate upon the subject.

It was indeed contended, that independently of this title to question the leases, there was sufficient interest left in the plaintiff, notwithstanding the sale in the Exchequer, to entitle him to ask a decree to set aside the leases, the sale having been subject to the leases, so that nothing more was disposed of than what remained of the estate after deducting the interests comprised in the leases; so that so much of such interests as had not been effectually given to the lessees, not belonging to the lessees and not having been sold, remained undisposed of in the original decree; but it

is not necessary to give any opinion upon that point, because if the plaintiff had an equity to set aside the decree in the Exchequer and the sale had in pursuance thereof, or if these proceedings were in themselves defective, his title to raise the question respecting the leases cannot be disputed ; and I have the satisfaction to find from the printed report that Sir *Edward Sugden* entirely concurs in this view of the case, and gives it as his decided opinion that the suit was not in its original joinder multifarious, but that the plaintiff, disputing the title of the mortgagees under the decree in the Exchequer and the sale, was clearly entitled in the same suit to raise his objection to the leases. If, then, he was so entitled to assert in one suit his equity as against the decree and sale, and also against the lessees, he must have been entitled in that suit to relief as to both, if he succeeded in making out his case. Suppose, at the hearing, he had made out his case so far as to set aside the decree and sale in the Exchequer, or to prove that they were defective and void, and that he was therefore still entitled to the equity of redemption, he would, no doubt, in that case have been entitled to ask of the Court a decision as to the leases, and this right could not properly depend upon the greater or less degree of resistance which the mortgagees might make to the plaintiff's title to relief as against them. If, at the hearing, they had by their counsel said that they could not resist the plaintiff's title to redeem, the hearing, as against them, would have been closed, and the title as to the lessees would alone have remained for decision ; but this is, in fact, what was done : the terms upon which the plaintiff was to have his decree against the mortgagees had been the subject of negotiation, but the groundwork of the whole was that the plaintiff should have a decree for redemp-

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tion against them ; nor could the defendants, the lessees, be in any degree prejudiced by this, for notwithstanding this arrangement, it was quite competent for them, and it necessarily formed part of their case, that the plaintiff had no title to question the leases, not having in him sufficient estate and interest to enable him to do so. For this purpose it was part of their case to insist that by the decree in the Exchequer, and the sale had in pursuance of it, the plaintiff had lost that estate and interest which was necessary to enable him to question the leases; and this was as much open to them after the arrangement with the mortgagees as before it took place, for if the lessees could show that before that arrangement the plaintiff had not any such estate and interest, his acquiring the estate and interest of the mortgagees, even before the hearing, would not have improved his situation ; but, in fact, he had it not at that time. If, as seems to have been understood at the time, the plaintiff had consented to the mortgagees keeping the estate under the sale, the plaintiff's position, as between himself and the lessees, would, no doubt, have been materially altered; but as the arrangement was that he should redeem the mortgages, I think that he was as much entitled to a judgment against the lessees, according to the merits, as if he had proved his title to redeem adversely against the mortgagees. Possibly the lessees may have relied upon the mortgagees fighting that part of the case which turned upon the want of title in the plaintiff; but as it was undoubtedly competent for the lessees to have done that themselves, they cannot complain if a decree has passed against them from their having omitted to insist upon a point in the case which was open to them.

It appears to me, therefore, that your Lordship

must come to the conclusion, that the grounds for the dismissal in *February* 1835, cannot be maintained. If that be so, it appears to me that there is the greatest difficulty in your Lordships proceeding any further in adjudicating upon the question between the parties; I mean, so as to pronounce any judgment upon the leases, as to which the case stands thus: there has been no adjudication below upon that subject; there is the certificate of the Court of Common Pleas against the leases; there was an argument in *February* 1835, before the Lord Chancellor of *Ireland*, assisted by the Chief Justice of the Common Pleas and the Chief Baron, but no judgment was pronounced upon it, the Lord Chancellor having been of opinion that the suit must be dismissed upon the point of form already observed upon. He, indeed, expressed a strong opinion in favour of the leases, but carefully guarded against any inference that he was deciding upon their validity. When the cause came on again before Lord *Plunket*, the lessees declined taking any other case for the opinion of the Court of King's Bench, and Lord *Plunket* made his decree setting the leases aside. After the opinion of one Court of Law has been obtained upon a case, if the Equity Judge entertains doubts as to the opinion returned, or thinks the case of so much difficulty and importance as to require further consideration, it is almost of course to send it for the opinion of another Court: it is certainly not necessary so to do, as the Judge in Equity may take upon himself to decide against the opinion of the Court of Law; but clearly the parties cannot require him so to do, or complain of his declining to decide the question without further assistance. If, therefore, the parties against whose case the Judges have certified, decline the offer of the Court to have another case sent to another Court, they cannot

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complain of the Judge acting upon the opinion already obtained ; and in an ordinary case I should think your Lordships would not be exercising a sound discretion if you were to open the door to further litigation, on behalf of a party who had declined to accept the offer of the Court below to put the case in the ordinary course for final adjudication.

But there certainly are great peculiarities in the present case : what had taken place in the cause, may naturally have led the lessees to think that they had a good ground for getting rid of the suit, without referring their title to further question ; which ground they must have abandoned had they accepted the offer of a second case. I do therefore think that it would be hard and might lead to injustice if we were to bind them by their refusal to accept that offer, particularly in a case in which there has been such a conflict of opinions upon the point of law : and I am the more inclined to think so because I do not see in the last decree any such inquiries and reservations of right, as it would seem the lessees would be entitled to before their leases could be taken away : for instance, I find that in the decree of 1802 they are ordered to account from 1784 to the party entitled to the arrears of the annuity, without reference to the amount which has been given upon the leases. Now before that can constitute a part of the claim of the *Chinnerys*, the lessees have a right to reserve those payments against the estate, and to stand in the place of that party for what excess of rent they might so pay, or what they might themselves advance. What was done upon this does not appear from the appeal papers, but it is obvious that a considerable demand may have arisen in favour of the lessees from the provisions of that decree ; but the decree of *July* 1835

simply declares the leases void, and proceeds to put the plaintiff into possession.

Now, it is very possible that these and other points may have been overlooked in the contest which was going on as to the principal matters in issue; and this affords another reason to induce this House not to attempt finally to settle the decree between the parties. It is, however, quite sufficient that, as to the question about the validity of the leases, there has been no judgment below, except the last decree, which proceeds upon the lessees' refusal to accept the offer of another case; and which, for the reasons I have given, I think ought not to bind them. I think, therefore, that for the purpose of obtaining such an adjudication, the case must be sent back to the Court of Chancery in *Ireland*; that Court will of course use its own discretion as to the manner of disposing of that question; that is, whether by deciding it itself, or calling for further assistance from another Court of Law. My object is, that this question should come before the Court relieved from all the difficulties with which it has hitherto been embarrassed: and this, I think, will be attained by this House declaring that it was competent for the Lord Chancellor of *Ireland*, at the time of making the decree of the 12th of *February* 1835, to adjudicate between the plaintiff and the defendants, the lessees, as to the validity of the leases; and, with that declaration, remitting the case to that Court, to be heard upon that question, and to make such decree between the plaintiff and the lessees as shall be just.

It is true, that if the lessees should adhere to the course they followed below, of declining another case, and should not ask for inquiries as to advances made by the lessees, expense might be saved by your Lordships now dealing with the case upon that ground:

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but unless I am so informed, I shall not suppose that to be the case. I therefore move your Lordships that the case be remitted to the Court of Chancery in *Ireland*, with the declaration and direction proposed.

It was declared by the Lords, &c. “that it was competent for the Lord Chancellor of *Ireland*, at the time of making the decree of the 12th of *February* 1835 (*d*), to adjudicate between the plaintiff and the defendants, the lessees, in the said suit in the Court below, as to the validity of the said leases: And it was ordered, that with this declaration the cause be remitted back to the Court of Chancery in *Ireland*, to be heard upon that question, and to make such decree between the said plaintiff and the said defendants, the lessees, as shall be just and consistent with this declaration and judgment.”—[71 Lords’ Journ. 370 & 648.]

[After the cause was remitted, a case was sent by the Lord Chancellor to the Court of Queen’s Bench in *Ireland*, and the questions as to the validity of the leases were again fully argued. Three of the Judges, viz. Chief Justice *Bushe*, and Justices *Burton* and *Perrin*, certified that the three leases to the *Sheehys* were not, nor was any of them, warranted by the power contained in the deed of the 25th of *May* 1779: Mr. Justice *Crampton*, the fourth Judge, dissenting, and certifying that all the three leases were warranted by the extraordinary leasing power in that deed.—See *Lord Muskerry v. Sheehy*, 2 Jebb & Symes, 300.]

(*d*) The date of the decree being 13th of *July* in the Order, as first entered on the Journals, was afterwards corrected as above.

JOHN FLEMING - - - - - *Appellant.*

HENRY DUNLOP - - - - - *Respondent (a).*

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THE House of Lords will, on appeal, interfere with the practice of the Courts below in respect of procedure, when the form of procedure admitted below appears to be incompetent and to lead to dangerous results.

A bill of suspension and interdict is an incompetent procedure to try and determine the merits of contested municipal elections.

Procedure by bill of suspension and interdict cannot be taken against a party in possession of an office, to question his right thereto, by a party who is not in possession ; nor can it apply to a case where neither party is in possession, nor to acts done anterior to the act of election.

Where a party is in the legal and undisputed possession of a municipal office, it is competent for him, by suspension and interdict, to protect his office against the unauthorised intrusion of a party who has no title to the office : but it does not put into office a party who has the abstract right to it.

An interlocutor, passing a bill of suspension, and granting interdict, is subject to appeal to the House of Lords, within the 48 Geo. 3, c. 151.

*Municipal
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MR. *WILLIAM MILLS* was elected a member of the town council of the city of *Glasgow*, at the first municipal election under the Act 3 & 4 Will. 4, c. 76, (in *November* 1833); and on the 7th of *November* 1834 he was chosen by the council to be Lord Provost, that office having become vacant by the resignation of Mr. *Graham*, who had been elected to it in 1833, under the new system. Mr. *Mills* remained in office as Provost until *November* 1837, being three years from the time of his election as Lord Provost (the statutory period), and four years from the time of his election as

(a) The question which was raised but not decided, in the case of *Monteith v. M'Gavin* (*ante* Vol. V. p. 459), namely, whether an application to the Court of Session, by bill of suspension and interdict, is a competent mode of procedure to try the validity of an election of a municipal officer, and of his right to the office in a Royal burgh in *Scotland*, has been, among other questions, determined in the present case.

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town councillor. On the 7th of *November* 1837 a new election of town councillors took place; and Mr. *Mills*, having been one of the third part of the councillors who were bound by the provisions of the statute to go out of office on that day, went out accordingly, but was again put in nomination for one of the wards of the city, and was replaced in the council for that ward. The poll-books were transmitted to him next day as Lord Provost, in order that he might, with the assistance of the town clerk, cast up the votes and declare the persons elected, &c.; but in consequence of a protest by several registered voters and town councillors against Mr. *Mills*, insisting that his period of office expired on the 7th, and that, as there was no Provost, the senior magistrate was the proper officer to cast up the votes and declare the elections, and generally to act as chief magistrate until a Provost was elected, Mr. *Henry Paul*, who filled the office of first bailie, by the advice of the assessor of the city presided with Mr. *Mills* at that meeting, and both signed the minutes. On the 9th of *November* there was another meeting for the purpose of swearing in the councillors who had accepted, and at that meeting Mr. *Paul* alone presided, and administered the oaths of office to the new town councillors, and to Mr. *Mills* among the rest; which was alleged as the reason of his not presiding, as he could not administer the oaths to himself. On the 10th of *November*, in pursuance of the provisions of the statute, a meeting was held for the purpose of electing a provost and other office-bearers. Mr. *Mills* claimed to preside at that meeting, insisting on his right to hold the office of Lord Provost until a successor should be elected; some of the councillors protested against his presiding, and that Mr. *Paul* was senior magistrate and had the exclusive right;

against which there was a counter-protest by other councillors. The result was that Mr. *Mills* and Mr. *Paul* presided together.

Mr. *Dunlop* (the Respondent) was proposed by one party for the office of Lord Provost; Mr. *Fleming* (the Appellant) was proposed by another party. There being an equality of votes, Mr. *Mills* declared that he gave his casting vote for Mr. *Fleming*, and Mr. *Paul* declared that he gave his casting vote for Mr. *Dunlop*. Mr. *Mills* declared Mr. *Fleming* duly elected Lord Provost, and Mr. *Paul* declared the same of Mr. *Dunlop*; whereupon a councillor protested that the latter had not been duly elected, and against his induction into office, and protested that Mr. *Fleming* had been duly elected and ought to be inducted: another councillor made similar protests against Mr. *Fleming*, and in favour of the election and induction of Mr. *Dunlop*. Mr. *Mills* then administered the oaths of office to Mr. *Fleming*, who subscribed thereto; and Mr. *Paul* administered the like oaths to Mr. *Dunlop*, who subscribed the same. Mr. *Mills* then invested Mr. *Fleming* with the gold chain and other symbols of office which he himself held. Mr. *Fleming* and Mr. *Dunlop* then took the chairs respectively vacated by Mr. *Mills* and Mr. *Paul*, and they both subscribed the minutes of the election of certain magistrates and office-bearers elected at the meeting, &c.

Mr. *Fleming* continued, subsequently, to do several acts appertaining to the duties and privileges of Lord Provost, without any interference or interruption by Mr. *Dunlop*, who also performed some acts, and was recognized by his party as the duly elected Lord Provost.

Mr. *Dunlop* presented, as soon as was possible, a bill of suspension and interdict to the Court of Session, alleging therein his right to the office of Lord

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Provost, and praying the protection of the Court against the attempts of Mr. *Fleming* to usurp that office and its privileges, and to molest him in the execution thereof. The bill set forth, among other things, extracts from the 15th, 16th, 17th, 22d, 24th (a), and other sections of

(a) The 15th section enacts that upon the first *Tuesday* of *November* 1834, and in every succeeding year, the electors in such burghs (contained in schedule C., which includes *Glasgow*) shall in their several wards or districts, and the other burghs, at their meetings, assemble and elect, in manner hereinbefore prescribed in relation to the first election under this Act, one-third part, or as nearly as may be one-third part, of the council of such burghs, in the place of the third part thereof who shall as hereinafter directed go annually out of office.

The 16th enacts that upon the said first *Tuesday* of *November* in the year 1834, and in every succeeding year, one-third, or a number as near as may be to one-third, of the whole council of each such burgh shall go out of office; and in the said year 1834, the third who shall go out shall consist of the councillors who had the smallest number of votes at the election of councillors in this present year (1833); and in the succeeding year (1835), the third of the councillors first elected under this Act who shall go out shall consist of the councillors who at such first election under this Act had the next smallest number of votes (the majority of the council always determining, where the votes for any such persons shall have been equal, who shall be the person to retire); and thereafter the third of the councillors so annually going out of office shall always consist of the councillors who have been longest in office; provided always that any councillors so going out of office shall be capable of being immediately re-elected.

The 17th enacts that the councillors of all such burghs not contained in schedule F. to this Act annexed (*Glasgow* is not contained in that schedule) respectively so elected and accepting, shall upon the third lawful day after the election of the whole number of such councillors in the present year (1833) assemble in the town-hall or other usual public place of meeting within such burgh, and shall there by a plurality of voices (the councillor who had the greatest number of votes at the election of councillors having a casting or double vote, in case of equality) elect from among their own number a Provost, or chief magistrate, the number of bailies fixed by the set or usage of such burgh, a treasurer, or other usual and ordinary office-bearers, &c.

The 24th enacts that when any magistrate or office-bearer, other than the Provost or chief magistrate and treasurer, shall be in the third of the council going out of office, the place of such magistrate or office-bearer shall be supplied by election by the council, as soon as the full number thereof shall have been completed by the annual

the statute 3 & 4 W. 4, c. 76, for regulating municipal corporations in *Scotland*: it stated the proceedings at the election of councillors on the 7th of *November*, and insisted that Mr. *Mills* must be held, upon the true construction of the Act, to have that day gone out of office, not only as councillor, but also as Lord Provost; and that his re-election as councillor, instead of re-suscitating the office of Provost in him, or destroying the fact of his having vacated it, was in itself a proof of the vacancy, which was left to be filled up by a new election. The bill also set forth, at length, the minutes of the three meetings of the council on the 8th, 9th, and 10th of *November*, with the protests and counter-protests, to the effect hereinbefore stated.

The Lord Ordinary, by an interlocutor of the 17th of *November* 1837, appointed the bill to be intimated and answered, &c., and the bill and answers to be printed, &c., in order to be reported to the Court, &c.

Mr. *Fleming* accordingly lodged answers, in which he gave in a narrative of facts; and, in conclusion, relied on the following pleas in law:—1st, that the application to the Court by bill of suspension and interdict was not a competent mode of procedure to try and determine the question as to the validity of the election; and, if it were, the proper parties were not called (*viz.* the whole councillors): 2dly, assuming that it was a competent procedure, that he was validly elected, and legally in possession of the office: and,

election of the third then hereby directed to take place; the said election to be made by plurality of voices, and the chief or senior attending magistrate to have a double or casting vote in case of equality. Provided always that the Provost or chief magistrate, and the treasurer, shall always remain in office for the period of three years, and that they, as well as all the other magistrates or office-bearers, shall at all times be capable of being re-elected.

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3dly, assuming that his own election might be held liable to objection, that Mr. *Dunlop* had no right to the office, nor title to interfere with him in the exercise of it.

The Lord Ordinary reported the cause to the Court.

The Lords of the Second Division of the Court of Session, in the Bill Chamber, having considered the pleadings, and heard argument thereon, pronounced an interlocutor on the 7th of *December*, appointing the case to be put to the roll on the 15th; and another interlocutor on the 16th of *December*, passing the bill, and granting the interdict as craved (*b*).

Mr. *Dunlop* expedited his letters of suspension and interdict, and served Mr. *Fleming* on the 21st; but Mr. *Fleming* had, on the 20th of *December*, presented his petition of appeal to this House against the interlocutors. Mr. *Dunlop* soon afterwards presented to the House a petition, praying that the petition of appeal might be dismissed as incompetent. Both petitions were referred to the Appeal Committee, who sustained the appeal.

While the appeal was pending various acts and arrangements, not necessary to be noticed here, took place between the parties respectively and the town council of *Glasgow*, for the more convenient discharge of the duties of the office of Lord Provost, without prejudice to the rights of either, until the decision of this House should be obtained.

The appeal was heard on the 30th of *May*, and the 3d and 6th of *June* 1839.

The *Lord Advocate* (Mr. *Rutherford*) and Mr. *M. D. Hill*, for the Appellant:—If any review can be had of

(*b*) 16 Dunl. B. & M. 254.

municipal elections, on the merits, while conducted in accordance with the new statute (c), the procedure must be by action of reduction and declarator. The merits of the election could not possibly be tried and determined in a proceeding by bill of suspension and interdict, especially where it is brought against the party in possession; the effect of interdict being to prohibit the party from acting, thereby leaving the office as it were vacant, and the duties unperformed, as it could not put another party in his place. The bill in this case put the merits of the election in issue; it set forth the governing clauses of the Act (d), and the minutes of the meetings of council; from which conclusions are drawn that the election of the Appellant was invalid, and that of the Respondent valid. The Appellant's answer embodies opposite conclusions. The Court below would consequently have, in this form of procedure, to try and determine the validity of the election. The new statute did not alter the laws and usages applicable to the trial of burgh elections under the old system; the 36th section of the new Act declared that all former laws and usages remain in force, except so far as they are inconsistent with the new Act. The only alteration effected in respect to the elections by that Act, is the substitution of a triennial, for an annual, election of Lord Provost and treasurer. No case can be found, after diligent search of the reports and records for a century, in which a bill of suspension and interdict was applied to the trial of a contested burgh election. The procedure has ever been by reduction and declaration, or by petition and complaint, a summary

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(c) 3 & 4 Will. 4, c. 76.

(d) *Vide ante*, p. 46.

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proceeding given by the Acts 7 *Geo.* 2, c. 16, and 16 *Geo.* 2, c. 11, which is now deemed to be taken away. When the procedure by suspension and interdict was first attempted in *Orr v. Vallance* (e) in 1831, the Court of Session decided that it was incompetent, and that decision was referred to in 1832 as settled law, in the case of *Watson v. The Commissioners of Police of Glasgow* (f).—[Those cases, and others that were cited in this part of the argument, are stated by the Lord Chancellor, *post*, p. 57 *et seq.*]

It would be a most dangerous position to hold that the election of the Appellant was invalid on the ground that Mr. *Mills* was not the proper presiding officer, on the 10th of *November*, to give the casting vote; yet that is the ground of the Respondent's claim of right to the office. The existence of corporations depends on the fundamental principle of perpetual successions. The continued existence of the municipal functionaries is necessary for the administration of the offices of the corporation until successors to them are elected. Were there a discontinuance of the office of Provost in *Glasgow*, the greatest inconvenience would follow; the civil, judicial, and administrative powers would be all in abeyance. By the 24th section of the Municipal Corporations Reform Act, the Provost and chief magistrate shall remain in office for three years. There was to be a perpetual continuance from the day of their election until, by the lapse of three completed years, their powers should be transmitted to their successors by new election, or retained by themselves by re-election. Mr. *Mills*' period of three years in the office of Provost was not completed until the 10th of *November*. Al-

(e) 10 Shaw & D. 93.

(f) Fac. Coll. 10 March 1832.

though, therefore, he was among the third of the council going out of the council within the statutory period of three years, there was no discontinuance of the office of Provost until the close of the 10th of *November* and a successor was elected. The 10th, 31st, and other sections of the new statute, gave additional force to that position.

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Mr. *Paul*, on whose casting vote the Respondent's assertion of right to the office of Provost is founded, had no lawful casting vote; he was not the senior magistrate, and had no right to preside. The concession by Mr. *Mills*, on the recommendation of the assessor, to allow Mr. *Paul* to preside with him, does not affect the question. His office of senior bailie was subject to annual election, and he was out of that office in fact on the 7th of *November*, and his powers were extinguished, unless he was re-elected on the 10th. But as the election of Provost precedes that of the bailies, he would have no right to preside at the election of Provost: should it be held that his powers as bailie continued until the election of a successor or his own re-election, then by the same rule the powers of Mr. *Mills* as Provost commenced, and the Provost unquestionably is the senior magistrate and has the casting vote.

No question can be raised now as to the competency of this appeal. Objections were made to it before the Lords of the Appeal Committee, who disposed of them by sustaining the appeal: that would be a sufficient answer to any objection that might be made to the appeal at the bar, on that point. There was no ground for objecting that the appeal was prohibited by the Act of the 48 *Geo.* 3, c. 151. If the Lord Ordinary had refused the bill, unquestionably that would be a final judgment, and therefore appeal-

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able. Then why should the appeal lie against the interlocutors admitting the bill, as much as if it had been refused? In any view, the interlocutors, as far as they granted an interim interdict, were subject to appeal.

Mr. *Pemberton* and Mr. *Knight Bruce*, for the Respondent:—This appeal is incompetent, in the terms of the Act 48 *Geo.* 3, c. 151 (*g*), as being an appeal against an unanimous judgment of an interlocutory nature, without leave of the Court below. It was not a judgment or decree finally exhausting the merits, but merely opening the way for a final discussion of them upon the letters of suspension. The interlocutory orders on the suspension and interdict did no more than direct a change of the possession of the office. It is frequently necessary, in the course of a cause in the Court of Session, to make regulations respecting the interim possession of property and offices; and it would lead always to serious inconvenience, and sometimes to an obstruction of the administration of justice, if these regulations were subject to appeal without leave of the Court, as every appeal had the effect of bringing up the whole record, and of stopping further proceedings in the Court below: besides, it was not usual with the House to interfere with the practice or procedure of the Courts below, which are admitted to be the best and the only proper judges of their own forms of procedure.

The question between the parties on the merits is,

(*g*) By section 15, it is enacted that no appeal to the House of Lords shall be allowed from interlocutors, but such appeals shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the Division of the Judges pronouncing such interlocutory judgments, or except in cases where there is a difference of opinion among the Judges of said Division.

on whom did the election fall? That question depends on another; namely, whether the casting vote, which indisputably resided in *Mills* or *Paul*, belonged to the former or to the latter? And that question again comes to this: had *Mills* ceased to be Provost on the 7th, when he ceased to be a town councillor; or did he continue, not only to the 10th, but to the completion of the 10th of *November*? But on reference to the minutes of the meetings, and to the provisions of the statute, it would appear quite clear that the casting vote given by *Mills* was inadmissible, as he had not then a *status* or privileges under his former office of Provost, which had wholly ceased on the 7th, when he ceased to be a councillor, for he could not be Provost when he was not councillor. That position is confirmed by the fact that *Mills* did not preside at the meeting on the 9th, when *Paul* alone presided, and his title to preside on that day as senior bailie and chief magistrate continued till the election of Provost on the 10th; he therefore was the person who had the casting vote, and that vote being given to the Respondent, gave him the election. The Respondent being therefore duly elected Lord Provost, he was entitled to have the Appellant interdicted from molesting him in the exercise of his office.—[It is not necessary to repeat the arguments applied to the merits of the election, as there was no decision given on them by the House].

With respect to the objections to the procedure, it cannot be doubted that the Court of Session had jurisdiction to give redress in this case. The Respondent avers a wrong done to him; that he was duly elected Lord Provost, and is molested by the usurpation of his office by the Appellant, who had no title to assume the office, and the Respondent seeks to interdict him

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from so acting. The Court has undoubtedly jurisdiction to give protection to the Respondent; but in what shape that protection is to be afforded is not a question of jurisdiction but of form, which the party has a right to choose, and the Court, it is submitted, a right to adopt and approve. In cases of wrongful encroachment on legal rights, where a summary remedy is necessary, the procedure by suspension and interdict is well recognized. (*Erskine*, B. iv. tit. 3, sect. 20; *Darling's Practice*, 283, and the cases there cited). The summary redress by the Acts of the 7 & 16 Geo. 2, are no longer available. The procedure by reduction and declaration would give the Respondent no redress, and would be wholly inapplicable to this case, for the title is with the Respondent. The only shape, therefore, in which the Appellant could obtain redress was the mode of proceeding by suspension and interdict. No doubt was entertained of the competency of this procedure in a recent case of usurpation on the rights of a municipal councillor, by a party pretending a right to exclude him. *Scott v. The Magistrates of Edinburgh (h)*.

June 13.

- The *Lord Chancellor* :—This case raises a question of the utmost importance; not so much as affecting the interests of the parties to this litigation, but as respecting the general rule, which, if not properly laid down for the guidance of the Court below in future cases, may be extremely prejudicial to the corporations and corporation law of *Scotland*. It has been considered that the provisions of the statutes of the 7 Geo. 2, c. 16, and 16 Geo. 2, c. 11, giving a sum-

(h) 1 Dunl. Bell & Murray, 347 (N. S.)

mary remedy, by application by petition and complaint to the Court of Session, in questions arising out of municipal elections, do not apply to the system of corporations now established under the Municipal Corporations Reform Act. I think your Lordships will find that from that circumstance a course is likely to be adopted, which, if not properly regulated, may lead to very serious consequences as affecting these corporations.

The facts of the case which gave rise to the present litigation were simply these:—Upon the election in *November* 1837, in the corporation of *Glasgow*, two persons were candidates for the office of Lord Provost; the votes of the council being equal for each, the election came to be decided by the casting vote of the presiding officer. It was made a matter of question, whether the Lord Provost, who had been in office the three preceding years, was the presiding officer; that is, whether he continued Lord Provost up to the 10th of *November*, when the election took place, or whether he had ceased to be Lord Provost on the 7th of *November*. If he had ceased to be Lord Provost, another person would be entitled to preside as the senior magistrate. The question therefore was, whether the one or the other had the casting vote: the one voted for the one side, and the other voted for the other; so that the question who had been elected Lord Provost, turned on the question who was the presiding officer at that election. There was no possession of the office by either party; each claimed to have been properly elected, and there was nothing done which could be said to put either party in possession. Under these circumstances one of the parties applied in the Bill Chamber for an interdict. The Lord Ordinary reported it to the Inner House, and the Inner House, upon

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an application for a suspension and interdict, granted an interdict against one party; and that is the subject of this appeal. The first question, therefore, raised, independently of the merits of the election, is whether this be a proper course of proceeding to decide upon the merits of the election under the circumstances which occurred in this case.

It seems to be a statement common to both sides that there is a great paucity of authorities to be found in the records of proceedings in the Court of Session on this subject; and that may be accounted for during the period anterior to the 3 & 4 W. 4, c. 76, when the statutes of *Geo. 2 (i)* were in force. I find, however, that although there may be but few cases, there seems to be no question as to certain propositions that may be laid down; namely, that a proceeding by suspension and interdict cannot apply against a party in possession of an office; it is equally clear that it is not applicable to proceedings prior to the election. It can hardly be supposed to apply to any case, except where, from the proceedings at the election, it is a matter of doubt who has been elected, neither party being in possession of the office which is the subject of the election. But there is ample authority that this mode of proceeding is not the mode to decide the question of election in a burgh election at all.

There is another class of cases indeed, with regard to which the authorities seem consistent; namely, that where there is an undisputed right to an office, and the party is in possession of the office, it is not incompetent to apply this mode of proceeding for the purpose of protecting the person in possession of the office against an unauthorised intrusion by a mere stranger;

(i) 7 G. 2, c. 16, and 16 G. 2, c. 11.

but your Lordships, I think, will find that it is confined to cases where the title to the office is so clear and so free from doubt that there is no question to be adjudicated upon as to the title to the office. I find almost all these propositions laid down, and by all the Judges, in the case of *Orr v. Vallance* (*k*), (in 1831): the Lord Justice Clerk in that case, says, "I have a clear opinion that this application (for suspension and interdict) is incompetent. I apprehend that there is no point more thoroughly fixed than that there is no process for reviewing proceedings of town councils, filling up a vacancy, real or supposed, other than by petition and complaint, or reduction." Petition and complaint do not apply now to the corporations in *Scotland*. "Then what is the nature of this? It is in form, no doubt, a complaint against the actings of this person, *Vallance*, as chief magistrate; but what is put in issue is the validity of the election by the town council, and we have the regular minutes of the election as an appendix to the bill. If we could sustain such applications under the miserable cover that they are only against the actings of the man, there would be no case in which the same sort of argument might not be used to sanction a bill of this kind, instead of a complaint or reduction, in which it is a fundamental principle that the council, one and all, must be called. It is not necessary to enter into the question whether all the parties are called, for on the incompetency alone I think the bill must be refused." Lord *Glenlee* said, "I am of the same opinion: if *Dods*," the party who was unquestionably in possession of the office, "had applied, it would have been a different case; but the complainers have no title in them, and we must first

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(*k*) 10 Shaw & D. 93.

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of all enter into the consideration of the merits of the election, which is incompetent in the present shape.” [His Lordship having read the concurring opinions of Lord *Cringletie* and Lord *Meadowbank*, said :] It is impossible that any doctrine can be laid down more distinct in itself or more directly applicable to the present cause. They say that that Court cannot try the merits of an election in a proceeding by suspension and interdict. But that case is supposed to have been interfered with by the case of *Watson v. The Commissioners of Police of Glasgow* (l), which took place in the following year (1832). The circumstances of that case are by no means similar. It was not a burgh election. The learned Judges took a distinction between the two cases, recognising to the full extent the doctrine laid down in *Orr v. Vallance*; the Lord Justice Clerk saying, “The case of *Vallance* is in no respect parallel to the present; the former referring to a burgh election, as to which there must be either a petition and complaint, or a reduction.”

At an earlier date than those cases (in 1825), was the case of *Drysdale v. The Magistrates of Kirkaldy* (m), the facts of which are not similar to the present; it is only valuable for the doctrine laid down, “That where a question of right to an office is in dispute, a declarator is necessary; and that a suspension and interdict is the proper form for complaining of any interference or molestation in the exercise of an office, the right to which does not require to be declared.” Up to the time at which it was declared that the summary proceedings under the statutes of *Geo. 2* were not applicable to the present state of *Scotch* burghs, there does not appear to have been any dif-

(l) Fac. Coll. 10 March 1832.

(m) 4 S. & D. 658.

ference of opinion amongst the learned Judges there, that the question of an election in burghs could not be tried by suspension and interdict.

After it was found that that mode of proceeding was not applicable, it appears to me that an attempt has been made, or rather a disposition has been manifested, to introduce a mode of proceeding which was not considered as competent before that time. Now, upon all the cases to which I have referred, nothing can be more clear than this proposition, that where a party was in possession of an office, his title to that office could not be questioned by proceedings of suspension and interdict; that it was necessary to proceed by process of reduction or declarator. There are obvious reasons, to which I shall presently advert, which show how utterly incompetent a proceeding of suspension and interdict would be to effect the object in view. But I am now referring to it only for the purpose of showing that, up to the year 1831, no doubt was entertained that suspension and interdict was not applicable to that state of things. Previous to this very election, one of the circumstances which gave rise to the election of Lord Provost, was the election of one of the councillors of the name of *M'Gavin*; and your Lordships will find, by referring to the report of *M'Gavin's* case⁽ⁿ⁾, which was argued during the last session, that *M'Gavin* was actually elected—actually then in possession of his office. Those who questioned his right to be a councilman depending upon a supposed defect in the list of electors, applied for a process of suspension and interdict. The Judges thought, under the circumstances, it was not a case in which they ought to grant an

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(n) *Monteith v. M'Gavin*, 5 Clark & F. 459; 3 Shaw & M'L. 290.

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interdict, but they sustained the competency of the proceeding; so that in *M'Gavin's* case they sustained the competency, although the proceeding by suspension and interdict was applied to a party actually in possession of his office, which in the three cases I have mentioned was considered by all the Judges as a totally incompetent proceeding for the purpose of questioning the title of a person in possession of an office.

Such is the state of the authorities: now for one moment let me call your Lordships' attention to the effect of proceeding by the process of suspension and interdict. The result and the only result of it can be to prohibit one party, the party against whom it is directed, from exercising the functions of an office which he either is in possession of, or which he claims the right to exercise; it decides nothing as to the right of election. It may prevent one man from exercising the duties of the office, but it does nothing towards putting any other person in his place: an observation which occurred to me when your Lordships were considering the case of *Monteith v. M'Gavin*, and was strongly exemplified by what had then taken place, but had not then been brought under your Lordships' consideration.

The only means of trying the right of parties to any office in a corporation, must be, first of all, to try the right of the party in possession, and then by some process to try the right of the party who claims to stand in his place. The proceeding by suspension and interdict may do the one,—it may undoubtedly displace the party in possession, not by depriving him of the office, but by prohibiting him from exercising the functions of the office. It does not declare that any other person ought to be elected in

his place, but prohibits the individual from exercising the functions of the office. It is not, therefore, surprising that the learned Judges, up to the time when the difficulty arose with respect to the statute 7 *Geo.* 2, c. 16, considered that the proceeding of suspension and interdict was wholly inapplicable for the purpose of trying the right to an office. In the present case, it is true that the party against whom the process was addressed cannot be considered as in possession of the office; because, a question having arisen as to the mode of election, both parties having claimed to be in possession of the office, in point of law it may be considered that neither of them is actually so. Now, if the learned Judges adopted this course of proceeding with the intention of deciding which of the two was really the Lord Provost of *Glasgow*, then they did that which in the cases of *Orr v. Vallance*, *Drysdale v. The Magistrates of Kirkaldy*, and *Watson v. The Police Commissioners of Glasgow*, to which I have referred, the Judges themselves stated distinctly that it was not competent for them to do upon that proceeding, because it would then be a proceeding to adjudicate upon the merits of an election in a case of suspension and interdict. But if they went on the ground that this is a mere intrusion, by a stranger, on the office of a party properly elected, they could never come to that conclusion without adjudicating that the other party had been first properly elected, and then to treat the other as a stranger intruding. They could not so treat him without considering the merits of the election. It is perfectly clear that they would have first to adjudicate on the merits of the election, and then to treat the other party as a mere intruder. But that applies only where the party is actually in possession; and if one party is not in

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possession, no more is the other party. I apprehend it is extremely difficult to explain the course that has been adopted, upon the supposition that they were acting upon that which is recognised as a competent mode of proceeding for protecting a party actually in possession of an office, against the unauthorised intrusion of a stranger. But if, on the other hand, they exercised a discretion as to the merits of an election, it must have been, in their opinion, a matter free from all doubt that the party upon whose account they allowed the suspension and interdict was the party duly elected.

It is not my intention, in the view I take of this case, to give any opinion as to the merits of the election; but to this extent I think your Lordships are bound to attend to what took place. It cannot be considered a matter free from doubt and difficulty which of the parties should be held to have been duly elected, the point turning upon the construction of the Act, as it is contended for by the Appellant, being that the Lord Provost for the time being, who by the Act is to remain in possession of his office three years, is, according to his construction, to go out of office at the anniversary of the day of election; whereas the argument on the other side is, that he is to remain three municipal years in the office, and that he shall retain his office till his successor is appointed. There appear difficulties enough on either side, upon considering the different clauses of the Act,—difficulties, which the Judges of the Court of Session can hardly have considered before they came to the conclusion that there was no question at all to discuss between the parties; but if there was any question to be discussed between the parties, then they were adjudicating upon the right of election, and were in a cause

of suspension and interdict deciding which of these two parties had been properly elected Lord Provost, contrary to all preceding authorities, and contrary to the doctrine which has been acted upon in all the cases to which I have referred. That is the state of the contest between these parties. The Court of Session has, by an interlocutor upon a bill of suspension and interdict, prohibited the one party from exercising the duties of the office, and put no other party in possession of the office, leaving the town of *Glasgow* just as much without a Lord Provost by any adjudication of right as it was before.

It was urged at your Lordships' bar that great inconvenience would arise from interfering with the interlocutor, inasmuch as it would leave the parties, and all those interested in the affairs of the corporation, in a state of uncertainty as to who was Lord Provost. It is perfectly true that great inconvenience must arise from this state of things. But in a question which affects all the corporations of *Scotland*, and which therefore it is of the utmost importance to have rightly understood at the earliest period,—after the question has arisen, no inconvenience that may arise to any particular corporation ought to induce your Lordships to take a course that might be productive of mischief to the general administration of the affairs of corporations. Would no inconvenience arise from sustaining the interdict that has been pronounced? It is admitted that it is no adjudication upon the right to the office; but it is said, if the party had not appealed, and therefore if the process had gone on in the usual course, it was essentially necessary, according to the rules laid down for that purpose, that within a certain number of days a suit should be instituted. But that suit would only have been a

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more formal way of calling for the same species of interference by interdict, which had been already made by the Lord Ordinary in the Bill Chamber; that would leave the matter just where it was. It is said that the Judges might have called upon the parties to adopt proper proceedings, by which a proper adjudication might have been obtained. If your Lordships think that this interdict ought not to stand, it will be competent to either party to adopt those proceedings which may lead to an adjudication upon the question of right; nor am I aware that any time will be saved in coming to a final conclusion as to who is Lord Provost of *Glasgow*, by your Lordships' adopting either the one course or the other. I have referred to the principal authorities which have been cited as impeaching the competency of the proceedings by suspension and interdict. But if that had been a recognised course of proceeding, that is, if the Court had, by means of this summary process, the power of deciding questions upon controverted elections without the delay of a regular suit for that purpose, one would be inclined to ask, why was that summary proceeding given by the statute of *Geo. 2*? If any summary process already existed, why give that summary process in addition, by petition of complaint? Nothing can be more rapid than the proceeding by suspension and interdict; and if it is competent for the Judges by that proceeding to adjudicate upon the merits of an election, it could not, in point of rapidity, be improved upon by any other mode of proceeding. It is evident, therefore, that it was not known at that time that there were already existing in the Court of Session, means of deciding by summary process, and therefore the statute gave a mode of proceeding by petition of complaint.

My Lords, two cases, and two only, have been cited as interfering with the doctrine laid down by the learned Judges in the case I have referred to. The first is that of *Chalmer v. The Magistrates of Edinburgh* (o); but that case does not appear on examination to be one which can have any influence upon your Lordships' judgment in the present instance. It was not a burgh election, which, according to the doctrine of the learned Judges already adverted to, makes a distinction between that and the other cases; nor was it an original application to the Court of Session to interfere with the existing right by suspension and interdict. It was a process of suspension and interdict, it is true; but it was an appeal to the Court of Session from the adjudication of the magistrates of *Edinburgh*, who had decided upon an election matter subject to their jurisdiction: therefore, although the proceeding was undoubtedly by suspension and interdict, it was a proceeding of such a nature as prevents it from being an authority in favour of the present proceeding. One cannot however but observe in that case something contrary to what is laid down generally as applicable to all cases of proceeding by suspension and interdict; namely, that it was a proceeding against the party actually possessed of the office. It might, therefore, well be a question, if the case was material to the present purpose, whether that decision would not be liable to be impeached upon the ground of its being a proceeding by interdict against the party actually in possession of the office. The other case referred to is *Gray v. The Magistrates of Anstruther Wester* (p). That is a case which, so far from being applicable to the present, was a case where

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(o) Mor. 1863. (1782.)

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(p) Fac. Coll. 29 June 1819.

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the proceeding was by petition and complaint, under the statute of 7 *Geo.* 2, c. 16.

My Lords, it may, perhaps, be found necessary, if the Court of Session has lost the jurisdiction given to it by the statute of 7 *Geo.* 2, and is incapable of administering justice in the case of controverted elections in burghs in *Scotland* by summary proceeding, that the Legislature should interfere, in order that the Court of Session should have the summary power given to it which it had under the statute of *Geo.* 2, and which it appears it has lost, with reference to the existing corporations of *Scotland*. Whether that ought or ought not to be done, is not now the matter for consideration; but the circumstance of the Court having lost the power under that statute, can be no reason why the power should be exercised under a jurisdiction which it appears, at the time when the Municipal Corporations Reform Act was passed, was found incompetent, and over and over again declared to be incompetent, for the purpose of trying elections in burghs in *Scotland*. It is impossible that justice can be done by this course; it is wholly incompetent to carry into effect that which must be the object of every Court, in interfering with questions as to the validity of these elections. But then another strong reason against your Lordships' sanctioning a proceeding of that character, is this: that there are already modes of proceeding which, although not summary, are calculated to meet every possible case that can arise. If the party is improperly in possession of an office, it is not a matter of dispute that the Court of Session has jurisdiction by process of reduction to displace him from that office. If the party be not actually in possession of that office, then there is nothing to reduce. If a question arises, which of two parties is

properly elected, then the proceeding by process of declarator is, beyond all question, competent and suited to the purpose of enabling the Court of Session to adjudicate between the parties, and to say which of the two is to be considered as properly exercising the duties and functions of the office. It is very true that these are not summary proceedings; but it is equally true, as I apprehend, and not disputed on either side at the bar, that, coupled with these proceedings, the proceeding by suspension and interdict might very well be applied; so that, pending the proceeding in which ultimate adjudication was to take place, the Court might in the meantime, by virtue of this process of suspension and interdict, regulate as to the party who should happen to be in possession of the office. Whether that be or be not a course of proceeding consistent with the practice of the Court of Session, it is not necessary at present to consider; it was represented at the bar, and I find it referred to as the recognized practice in some of the cases to which I have adverted. The present question is, whether it is a wholesome practice that in the present case the Court of Session should proceed by suspension and interdict only.

There is another point to which I shall have to call your Lordships' attention. But upon the merits of the case, considering that this is a question at least difficult to be decided, which of these two parties is properly elected,—and therefore a question in which the proceeding by interdict cannot be supported upon the ground of its being a mere intrusion upon an office of which some other person is clearly and legally in possession,—I should advise your Lordships not to sanction a proceeding which, if acted upon by the Court of Session in *Scotland*, must obviously lead to serious consequences.

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It has been objected that this appeal is incompetent, because this is not a final adjudication between the parties, and under the statute no appeal lies from an interlocutory order. The very general terms used in the statute (*q*) prohibiting appeals against interlocutory orders, no doubt, have created considerable difficulty in several cases which have occurred; and it is often matter of difficulty to ascertain within the meaning of that Act, whether a particular proceeding is to be considered as interlocutory or not. From the best information I have been able to obtain as to the nature of this proceeding, it cannot be considered an interlocutory proceeding. It is a preliminary proceeding, it is true, but it is final as far as that proceeding itself is concerned, the proceeding being by application made *ex parte* in the first instance to the Lord Ordinary, in the Bill Chamber, stating the case and praying for an interdict; it prays that the Lord Ordinary may pass the bill and grant the interdict. If he passes the bill and grants the interdict, as far as passing the bill is concerned, it is merely an authority for a more regular proceeding being commenced; but it is final: he may refuse the bill, and if he refuses the bill nothing farther can be done in that proceeding; but the party may apply again to the same or to another Lord Ordinary, for letters of suspension and interdict. In considering whether this is final or not, and whether it is a subject of appeal or not, you must suppose the Lord Ordinary either to decide the one way or the other: suppose he refuses the bill, that may be productive of the greatest possible evil to the parties; but the opinion of the Lord Ordinary is final; that is, he refuses the interdict, because that is the effect of his refusing the bill; and he denies to the party the opportunity of

(*q*) 48 G. 3, c. 151.

pursuing that remedy at least, though he may adopt some other, or may again apply to the Court for a similar remedy.

It seems hardly necessary to consider this any further, because I find by reference to a case which I believe was referred to in the argument, that your Lordships have entertained appeals upon proceedings of this kind. I find in the case of *Scott v. Brodie* (r) (in 1803), that the Lord Ordinary had passed the bill and granted the interdict. That was the subject of an application to the Court of Session, which sustained the bill, but varied the terms of the interdict; so that there was the order of the Lord Ordinary confirmed, as to the principal part, by the Judges of the Court of Session. The interdict was in some degree altered; that was made the subject of appeal to your Lordships' House. Now, that was in precisely the same terms as the present, for all material purposes; for, although here the Lord Ordinary did not himself originally exercise a jurisdiction, but reported the case to the Inner House, and the bill was in the first instance passed and the interdict granted by them, yet it was in that case the order of the Court of Session passing the bill and granting an interdict, that was made the subject of an appeal to this House. I do not apprehend, therefore, that your Lordships will feel any difficulty in exercising your jurisdiction in this case, and that you will not consider that it is taken away by the Act of Parliament, inasmuch as the proceeding, though preliminary, is a proceeding complete in itself, and therefore it is to all intents and purposes within the meaning of the Act a final adjudication, upon which an appeal will lie to this House upon the provisions of the Act.

(r) Fac. Coll. (1803).

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I by no means wish to be understood as giving any opinion as to whether a jurisdiction exists by suspension and interdict in other cases; it is a question of practice which is much better left to those who are familiar with the practice of the Court of Session. But looking at the authorities which are to be found in the books, and finding this to be a question in which an interdict could not be granted without an adjudication upon the merits of the election, and finding that all the Judges have laid down, in the case to which I have referred, that it is not competent in proceeding by suspension and interdict to adjudicate upon the merits of the election, I think your Lordships will adopt the safest course by not sanctioning a proceeding which may lead to dangerous consequences, and which is contrary to all the authorities to be found in the books; but that your Lordships will adopt a much safer course by remitting it to the Court of Session to consider what is the best course to be taken in these cases, but not permitting them to interfere with the merits of an election upon a proceeding by suspension and interdict. The best way to effect that object, I submit to your Lordships, will be to reverse the interlocutor passing the bill and granting the interdict, which has been pronounced in the Court below.

The order made was, that the interlocutors complained of be reversed, and that the cause be remitted back to the Court of Session, with instructions to refuse the bill of suspension, and to do otherwise therein as may be just and consistent with this judgment.

SAMUEL BIGNOLD and Another - - - *Appellants.*

THOMAS OSBORN SPRINGFIELD and }
Others - - - - - } *Respondents.*

1837 :
April 24.

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Feb. 19. 21.
June 25.
August 5.

By Act 5 & 6 Will. 4, c. 76, s. 71, it is enacted that all the estate and interest of such bodies corporate, or members thereof, as were seised or possessed of any real or personal estate in trust for charitable uses, should, in respect of such uses and trusts, continue in the persons, who at the time of passing the Act (1835) were such trustees, until the 1st day of *August* 1836 or until Parliament should otherwise order, and should thereupon utterly cease and determine: Provided that, if Parliament should not otherwise direct on or before the said 1st of *August*, the Lord Chancellor or Lords Commissioners of the Great Seal should make such orders as they should see fit, for the administration, subject to such charitable uses and trust as aforesaid, of the said charity estates and funds. Parliament did not pass any subsequent Act on the subject before the 1st of *August* 1836.—

*Statute—
Construction
of
Charities.
Jurisdiction.
Competency of
Appeal.*

HELD that the administration of the charity estates and funds did not continue in the persons so described, after the 1st of *August* 1836; and that it was competent to the Lord Chancellor, after that day, to make orders for the appointment of new trustees for their administration.

Orders made by the Lord Chancellor in the matter of such charitable estates and funds, by virtue of the said Act and of the Act 52 Geo. 3, c. 101, which last gives an appeal to the House of Lords, are subject to such appeal.

Whether orders made by virtue of the Act 5 & 6 Will. 4, c. 76, alone, are subject to appeal, *quære*.

AT the time of passing the Act of Parliament, of the 5th & 6th W. 4, c. 76, intituled, “An Act to provide for the regulation of Municipal Corporations in *England* and *Wales*,” the corporate body of the city of *Norwich*, or some members thereof in their corporate capacity, stood solely, or together with other persons elected solely by such body corporate or solely by some par-

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ticular number of its members, seised or possessed for some estate or interest in various hereditaments, sums of money, chattels, securities for money, and other personal estate, producing an annual income of about 8,000 *l.*, in trust for various charities.

The 71st section of the said Act is as follows:
 “And whereas divers bodies corporate now stand seised or possessed of sundry hereditaments and personal estate, in trust, in whole or in part, for certain charitable trusts; and it is expedient that the administration thereof be kept distinct from that of the public stock and borough fund; be it Enacted, That in every borough in which the body corporate, or any one or more of the members of such body corporate in his or their corporate capacity, now stands or stand solely, or together with any person or persons elected solely by such body corporate or solely by any particular number class or description of members of such body corporate, seised or possessed, for any estate or interest whatsoever, of any hereditaments, or any sums of money, chattels, securities for money, or any other personal estate whatsoever, in whole or in part, in trust or for the benefit of any charitable uses or trusts whatsoever, all the estate, right, interest, and title, and all the powers of such body corporate, or of such member or members of such body corporate, in respect of the said uses and trusts, shall continue in the persons who at the time of the passing of this Act are such trustees as aforesaid, notwithstanding that they may have ceased to hold any office by virtue of which before the passing of this Act they were such trustees, until the 1st day of *August* 1836 or until Parliament shall otherwise order, and shall immediately thereupon utterly cease and determine: Provided

always, that if any vacancy shall be occasioned among the charitable trustees for any borough before the said 1st day of *August*, it shall be lawful for the Lord High Chancellor or Lords Commissioners of the Great Seal for the time being, upon petition in a summary way, to appoint another trustee to supply such vacancy ; and every person so appointed a trustee as last aforesaid, shall be a trustee until the time at which the person in the room of whom he was chosen would regularly have ceased to be a trustee, and he shall then cease to be a trustee : Provided also, that if Parliament shall not otherwise direct on or before the said 1st day of *August* 1836, the Lord High Chancellor or Lords Commissioners of the Great Seal shall make such orders as he or they shall see fit for the administration, subject to such charitable uses or trusts as aforesaid, of such trust estates."

On the 16th of *August* 1836, the Appellants presented their petition to the Lord Chancellor, by their description of "two of the inhabitants of the city of *Norwich*, and also two of the persons who at the time of the passing of the Act of Parliament (the said Act) were members of the body corporate, called the mayor, sheriffs, citizens, and commonalty of the city of *Norwich*, on behalf of themselves and all other the persons who at the time of the passing of the said Act were members of and constituted such body corporate." The petition—which was intitled, "In Chancery ; In the matter of the charitable estates and funds heretofore vested in the mayor, sheriffs, citizens, and commonalty of the city of *Norwich*, as trustees for charitable purposes," and which was certified and allowed by his Majesty's Attorney-general, under the provisions of the Act authorising the Court to give summary relief

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by petition in cases of abuses of charitable trusts (*a*)—set forth the said section of the Act 5 & 6 *Will.* 4, c. 76, and stated that at the passing thereof there were vested in the corporation of *Norwich*, or some of its members in their corporate capacity, various estates, &c. in trust for various charities; all which were stated to be detailed in the 27th volume of the reports of the Charity Commissioners, to which reference was made: that the said corporation was composed of the mayor, who was an alderman, 23 other aldermen, two sheriffs—one of whom was one of the 23 aldermen—and 60 common councilmen, making in all 85 persons, two of whom had recently died: that petitioners were two of the aldermen: that consequently under the said Act, as they were advised, all the said charitable estates and properties became and continued in the survivors of the said 85 persons, upon and for the trusts, &c. to which they were properly applicable, and they had accordingly the management and administration thereof up to the 1st of *August* (1836): that no subsequent Act of Parliament had passed in relation to these matters, nor had any direction been given by Parliament in respect of the same: that from the nature of the said charities, by reason of their magnitude, the number of persons entitled to participate in them, and the purposes to which they were applicable, it was of essential importance that they should be administered by persons lawfully authorized; and that petitioners and the other members of the said corporation, could not safely proceed with the administration thereof without the sanction and direction of the Lord Chancellor. The petition therefore prayed

(*a*) 52 G. 3, c. 101; commonly called Sir S. Romilly's Act.

that it might be declared that, "according to the true construction of the said Act of Parliament, all the said charity estates, funds, and properties do now remain and continue vested in your petitioners and the others of the 83 surviving persons aforesaid, or in such of them as are or may be living at the time of making the order to be hereupon made, upon the uses and trusts and for the purposes to which, at the time of the passing of the said Act, the same were applicable as aforesaid; and that your petitioners and the said other persons may be at liberty and may be authorized to administer and apply the same, and the rents, interests, dividends, and annual profits thereof, upon and for such uses, trusts and purposes, in like manner as the same have been heretofore applied; or in case it shall appear to the Court that such is not the true construction of the said Act, then that your petitioners and such other persons as aforesaid may be appointed trustees for the aforesaid purposes, or otherwise that it may be referred to the Master of the vacation to appoint proper persons to be such trustees, with liberty for your petitioners and the said other persons to propose themselves as such trustees, and that in the meantime your petitioners and the said other persons may be at liberty to act in the administration of the said estates and funds, rents, and income thereof; and that all proper directions may be given for effectuating the aforesaid purposes, and for duly administering the said estates and premises, and that the costs of and incident to this application may be paid out of the said trust-estates; or that your Lordship will make such further or other order as to your Lordship shall seem meet."

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On the 19th of *August* 1836, the Respondents presented their petition to the Lord Chancellor, therein

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describing themselves, the first as mayor, the others as merchants or manufacturers, of the city of *Norwich*, and all as being members of the then body corporate of the said city; which petition was intitled, “In Chancery; In the matter of the Charities in the Borough and City of *Norwich*, called respectively the Great Hospital, Doughty’s Hospital,” and twenty-six other charities particularly named.

“And in the matter of an Act of Parliament (52 *Geo.* 3, c. 101), intitled, ‘An Act to provide a summary remedy in cases of Abuses of Trusts created for Charitable Purposes.’”

“And in the matter of an Act of Parliament (5 & 6 *Will.* 4, c. 76), intitled, ‘An Act to provide,’” &c. This petition stated, that King *Edw.* 6, by letters patent, dated the first year of his reign, granted to the then corporation of *Norwich* and their successors the late hospital of *St. Gyles* in *Norwich*, and also divers rectories, &c., lands and hereditaments, in the said city, and in the counties of *Norfolk*, *Essex*, and *Sussex*, upon trust, for the maintenance of certain charities in the said city, and for the maintenance of poor persons, and for other charitable purposes. The petition then stated, that divers other estates and properties, real and personal, and divers manors and personal estates, describing them particularly (all the same charities that were mentioned in the Appellants’ petition), had been for many years vested in the late corporate body of the said city, upon the various charitable trusts therein mentioned, and that the same had been hitherto administered by the said late body corporate. The petition then set forth the 71st section of the said Act of 5 & 6 *Will.* 4, c. 76, and referred to other sections; and that in consequence of there being no longer any trustees or trustee, the affairs of the said charities

could not be legally administered, and the direction of the Court became necessary for the administration of the charitable trusts, and the petitioners, as members of the town council of the said city, were interested in the administration thereof; the petitioners therefore prayed that it might be referred to one of the Masters of the said Court to approve of some proper persons to be appointed trustees of the said charities; or that his Lordship would make such other order for the administration of such trust-estates as to his Lordship might seem just and fit.

Affidavits were filed in support of the said petitions, respectively intitled as the petitions were; and the two petitions came on to be heard together before the Lord Chancellor, who, by an order dated the 20th of *August* 1836, and intitled in the four several matters of the titles of the petitions, was pleased to order that it should be referred to the Master of the Court in attendance during the vacation to appoint proper persons to be trustees of and for the charity estates and property then late vested in or under the administration of the corporation of *Norwich*, or any of the members thereof in that character, which were affected by the 71st section of the said Act (5 & 6 *Will.* 4); and that all deeds, books, papers and writings in the custody or power of the parties, relating to the said charity estates and property, should be produced before the said Master upon oath as he should direct, and that he was to be at liberty to state any special circumstances as he should think fit; and his Lordship did reserve the consideration of all further directions, and of the costs of the said applications; and any of the parties were to be at liberty to apply to the Court as there should be occasion.

Against that order the Appellants presented their

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petition of appeal to this House, on the 14th of *February* 1837.

On the 22d of *March* 1837, the Respondents presented a petition to the House, by which, after reciting the two petitions hereinbefore stated, and the Lord Chancellor's order on them, and the Appellants' petition of appeal against that order, they submitted that the said order of the Lord Chancellor was final and conclusive, and that no appeal lay therefrom, and prayed that the said petition of appeal might be dismissed with costs, or that the benefit of the objection to the said appeal might be reserved to the Respondents to the hearing.

The latter petition was referred to the Appeal Committee; and in pursuance of an order of the House, made on the suggestion of that Committee, the question as to the competency of the appeal came to be argued on that petition at the bar of the House by one counsel on each side, on the 24th of *April* 1837, before answer was put in to the petition of appeal.

Mr. *Pemberton*, for the Respondents:—The point raised by the preliminary objection is, whether under the 71st clause of the Act of 5 & 6 *Will.* 4, c. 76, giving the Lord Chancellor or Lords Commissioners of the Great Seal power to make orders for administering the charities theretofore vested wholly or partly in the corporate bodies, there is any appeal from such orders. It has been considered that, as Parliament had not made any provision in respect to those charities before the 1st of *August* 1836, the interests of all those who as members of corporate bodies were seised of estates, real or personal, in trust for such charities, had ceased, and the provisions of that 71st clause took effect. Both the petitions presented

to the Lord Chancellor on the 16th and 19th of *August* 1836, were intitled in or referred to the matter of the Act 5 & 6 *Will.* 4, c. 76, and it was under the jurisdiction thereby given that both classes of petitioners claimed relief from his Lordship, although one of the petitions was signed by the Attorney-general, under the Act 52 *Geo.* 3, c. 101. The Lord Chancellor's order of reference to the Master was likewise intitled in the matter of the Act of 5 & 6 *Will.* 4, being intitled in all the matters in which the two petitions were entitled.

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It is clear that if there is a new jurisdiction created by Act of Parliament, no appeal lies from that jurisdiction, unless appeal is given by the Act constituting it; and for the same reason, if new powers be vested in a Court already existing, that new jurisdiction so grafted upon the old tribunal is not subject to review by any other tribunal. If this matter is to depend upon the Municipal Corporations Act alone, there can be no question that the order is final, as being an order made under this new jurisdiction, which is not vested even in an ancient Court, but in certain individuals, and which jurisdiction might have been just as well vested in the Secretary for the Home Department, or the first Lord of the Treasury. The only question therefore for the House now is, whether by reason of one of those petitions having been intitled in the matter of the Act 52 *Geo.* 3, c. 101, by which an appeal is given to this House, the jurisdiction which is specially established by the Municipal Corporations Act can be so connected with that other jurisdiction as to be also the subject of appeal.

It is not necessary to remind your Lordships that the jurisdiction of this House, to review orders of Courts of Equity was in its origin the subject of much

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controversy; *Lord Wharton v. Squire* (b). Since that case no jurisdiction has been entertained by this House to review orders of Courts of Equity, unless such orders have been pronounced in judicial proceedings between suitors; and in no case where a special jurisdiction has been created by Act of Parliament will an appeal lie to this House, unless the Act expressly grants it. Accordingly there is no appeal from orders in lunacy; there was none from orders in bankruptcy; but by a recent Act(c) a special discretion is vested in the Lord Chancellor to review orders of the newly created tribunal in bankruptcy; and the Lord Chancellor's orders in bankruptcy, and those of the new tribunal, are by express enactment made subject to review by this House.

This question was much discussed in the case of *Wall v. The Attorney-general*, which originated in the matter of the estate of *Boyd* and *Benfield*, bankrupts, against whom extents had issued at the suit of the Crown, and orders had been made by the Court of Exchequer, under those extents, for sale of their estates, and to take an account of the incumbrances thereon, and to ascertain priorities, to realize the property, and distribute it. All those latter orders were made as orders on further directions, there having been a report from the Deputy Remembrancer, exceptions thereto, and then further directions; the usual proceedings in a suit in a Court of Equity. In the winding up of the causes (there were ten altogether), it was determined by the Court of Exchequer that the Crown was entitled to payment of its debt, with costs and with interest, out of the fund in Court, which consisted of monies arising from the produce of the estates, and from time to time paid into Court and

(b) Colles P. C. 276.

(c) 1 & 2 W. 4, c. 56, ss. 3 & 37.

vested at interest, and which, in consequence of the accumulation of interest during the time the matter was pending, far exceeded the amount of the Crown debt. Against that order an appeal was presented to this House, on the ground that the monies originally constituting the fund in Court had been paid in to the credit of the causes generally, and had not been appropriated to the payment of the Crown debt, and therefore the Crown could not take advantage of the increase which had taken place from vesting the monies in the public stocks. Both parties to the appeal came to argue the merits at the bar; but as soon as the case had been opened, Lords *Eldon* and *Redesdale* intimated their doubts whether an appeal would lie from such orders, and they desired the appeal to stand over until the question of its competency should be argued at the bar. That question was argued by Sir *Robert Gifford*, then Attorney-general, on one side, and Mr. *Fonblanque* on the other; I speak from my recollection of the case, having been counsel in it. Lords *Eldon* and *Redesdale*, after the matter had stood over for one or two Sessions, dismissed the appeal as incompetent (*d*), at the same time intimating their opinion that the order was erroneous; and the result was that the Appellants memorialized the Treasury, and obtained the relief which they prayed in the appeal.

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(*d*) *Wall v. The Attorney-general*, 11 Price, 643. It appears from the printed appeal cases in *Wall and others v. The Attorney-general* (in *Lincoln's Inn Library*), that *Boyd, Benfield & Co.* received in 1797 a sum of 50,000 *l.* from the Government for sending supplies to his Majesty's navy in the East Indies, for which sum they and others passed their bond to the Commissioners of the Navy; and that in 1798 they received 100,000 *l.* to be remitted in supplies to his Majesty's troops at the *Cape of Good Hope*. They failed in their duty of sending the supplies, and on a commission issued out of the Court of Exchequer a large balance was reported due from them to the Crown in respect of the last-mentioned sum, and extents were

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being filed, is
not subject-
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It is clear, from the proceedings in that case, that the jurisdiction exercised by the Court of Exchequer

issued in 1800 to the sheriffs of *Dorsetshire, Hertfordshire, &c.*, by which their estates were seized into the hands of the Crown. After the issuing of the extents, *Boyd, Benfield & Co.* were declared bankrupts, and assignees were appointed. The assignees, and a great number of persons claiming interests in the estates as trustees, mortgagees, and incumbrancers, were defendants to the writs of extent in ten several causes. There were references directed to the Deputy Remembrancer to take accounts of the property, and of the incumbrances thereon, to ascertain priorities, &c.: reports were made, and orders were made on these reports and sales directed, and the produce was from time to time paid into Court and vested in the three per cent. consolidated Bank annuities. By a final order dated the 22d of *December* 1815, it was ordered that so much of the funds in Court as would, at the time when the monies were invested, have answered the sum then due to the Crown, should be considered as then appropriated to the payment of the Crown debt, and that the dividends thereon, from the time of investment, should be considered as belonging to the Crown; also that the costs of the Crown be paid out of the general fund.

Against that order an appeal was brought by certain of the incumbrancers and by the assignees. To the appellants' case the following reasons were annexed, signed by Sir *Samuel Romilly* and Mr. *Fonblanque* :—

1. For that when a Court of Equity takes upon itself the application of a fund for the payment of debts or otherwise, no part of such fund is to be considered as appropriated to any particular claim, without the express direction of the Court; and that if such fund be productive of benefit, such benefit belongs to those who would have been affected with the loss, if any loss had accrued thereon.

2. That no appropriation was made by the Court of Exchequer of any part of the monies paid into Court, or of the stock purchased therewith, prior to the last order now appealed from; and that if such stock had fallen in price, the loss would have fallen on the debtors' estate.

3. That by such retrospective operation, the debt due to the Lords Commissioners of his Majesty's Treasury, though only a simple contract debt in its creation, is made to carry interest.

4. That the case is not such as to entitle the Lords Commissioners of his Majesty's Treasury to the costs of the proceedings.

The following reasons in support of the order were signed by Sir *Robert Gifford* (then Attorney-general), and Mr. *Gaselee* (afterwards Mr. Justice *Gaselee*), on behalf of the respondent :—

1. The debt, though originally in simple contract, on being found by the inquisition, became a specialty debt; and from that time and the actual seizure of the property under the extents, or at all events from the 20th day of *July* 1808, when the said debt was liquidated, and by the report of the Deputy Remembrancer and the confirmation by the Court ascertained to amount to the sum of 56,665 *l.* 18 *s.* 9 *d.*

was its equitable jurisdiction; and from decisions of that Court, as a Court of Equity, there is in ordinary cases an appeal to this House. The reason upon which the House, in dismissing that appeal as incompetent, proceeded, was that the 79th section of the Act

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(which is the period fixed upon by the order), so much of the produce of the estates as was sufficient to answer that debt became the property of the Crown; the Crown might have applied for, and obtained an order for the payment of it out of Court. It was, however, suffered to remain and has been made productive; and having accumulated by the addition of the dividends from time to time received upon it, the Crown must be considered entitled to that accumulation as arising from the use and employment of its own funds.

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2. Another way of considering it might be upon the posting of interest; and in the case of *The Drapers' Co. v. Davis*, 2 Atk. 211, Lord *Hardwicke* said, "The Court often decrees interest from the time the demand was liquidated, though the debt did not carry interest in its own nature;" and in that case the Court gave interest on the arrears of an annuity from the time the Master's report was confirmed (a period of 28 years), in favour of the representative only of the annuitant. The present case is still stronger in favour of the Crown, which only seeks to have the accumulations made from the use of its own property.

3. With respect to the costs, they are expressly given by the 25 Geo. 3, c. 35, s. 1.

The House did not pronounce any judgment on the merits; but on the objection to the competency of the appeal, an order was made, dated the 10th of June 1824, which, after reciting the names of the parties to the ten causes, was to this effect:—After hearing the first counsel for the appellants, an objection was taken by respondent's counsel that the appellate jurisdiction of the House did not extend to the order, as being made on the law side of the Court of Exchequer, &c.: and Counsel having been afterwards heard on the question as to the appellate jurisdiction in the case, and due consideration had, &c.:—

It was declared "that the said petition of appeal is not a proper proceeding for the purpose of obtaining the judgment of the House on the rights of the appellants, as affected by the order complained of in the appeal: and therefore it is ordered that the appeal be dismissed, without prejudice, nevertheless, to any proceeding which the appellants may be advised to institute for the purpose of obtaining relief touching the order so complained of, in case such order is in any manner injurious to the rights of the appellants, and finally to obtain the judgment of this House thereon in a proper proceeding for the purpose, in case the appellants shall not *otherwise* obtain that relief as they may be advised they are entitled to."—(56 Lords' Journ. for 1824, p. 369.)

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33 *II.* 8, c. 39, enacts, that if any person of whom any such debt shall be demanded, allege or plead “in any of the said Courts, good, perfect, and sufficient cause and matter in law, reason or good conscience, in bar or discharge of the said debt, &c. and the same cause or matter so alleged or pleaded, &c. be sufficiently proved in such one of the said Courts as he shall be impleaded, &c. for the same, that then the said Courts, and every of them, shall have full power and authority to accept and allow the same proof, and to acquit and discharge all persons that shall be so impleaded for the same.” The consequence of the construction which has been put upon that statute is, that you may plead to an extent any matter which would constitute an equitable defence; and it being competent to the parties to plead equity, they could have relief by filing a bill for the same purpose. If a bill had been filed in that case, the Court would have proceeded on its ancient jurisdiction; and if the order had been made on a bill filed, it would undoubtedly have been subject to appeal; but as all the proceedings took place under the jurisdiction vested in the Court by the statute (e), which had not given power of appeal to this House, the appeal was dismissed as incompetent.

In the case of *O’ Sullivan v. Hutchins*, a reference to arbitration had been made a rule of the Court of Chancery in *Ireland*, under the *Irish Act 10 Will. 3, c. 14*, and that Court made an order thereon, which was the subject of appeal to this House; but the learned Lords then present in the House being of opinion that no appeal lay against such an order, the Act giving no such jurisdiction, dismissed the appeal. That case, which was before the House in 1825, is mentioned in a note to the report of *O’Neil v. Fitzgerald* (f), which

(e) 33 Hen. 8, c. 39; and 25 G. 3, c. 35. (f) 3 Bligh, N. S. 24.

was the case of an appeal from an order pronounced by the Court of Exchequer in *Ireland* by summary proceeding, when there was no cause pending. It is difficult to understand from the report what was the result of the objection made to that appeal; but it appears that the House, in the first instance, was of opinion that it had no jurisdiction. The scanty mention of *O'Sullivan v. Hutchins* (g) is less satisfactory.

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(g) *O'Sullivan v. Hutchins*. The facts of this case, as they appear in the prints of the cases (in *Lincoln's Inn Library*) were these:— Differences having arisen between the appellant, *O'Sullivan*, and the respondent, *Hutchins*, respecting an agreement for a demise of land by the latter to the former, they consented to refer them to arbitration, and their submission was made a rule of the Court of Chancery in *Ireland* (under the Act 10 Will. 3, c. 14, an Act of the *Irish* Parliament), in a cause in which the respondent was plaintiff and the appellant was defendant. The appellant afterwards wrote several letters by way of notice to the arbitrator, that he withdrew from him all authority to proceed to an award. The arbitrator, disregarding those notices, made his award in 1820, directing the performance of the agreement by the appellant, and that he should pay the respondent a certain sum of money. The appellant showed cause against the award in the Rolls' Court, and the Master of the Rolls allowed good cause to have been shown, but declined to make any order. The appellant then applied to the Lord Chancellor to set aside the award, but his Lordship refused that application, and made an order confirming the award, and “ declaring that the parties, after their submission to make the reference a rule of Court, could not withdraw the authority so given.”

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An order of the Court of Chancery on an award, made between parties, upon a submission to a reference which was made a rule of Court, according to Act of Parliament (10 Will. 3), no bill being filed, is not subject-matter of appeal to the House of Lords.

The appeal was against that order; and the reasons (signed by Mr. *Charles Wetherell* and Mr. *A. R. Blake*) were to the effect that the submission might be revoked at any time up to the moment of making the award, and that in this case the authority was revoked by the appellant before the arbitrator began.

The reasons annexed to the respondent's case (signed by Mr. *Denman* and Mr. *Abraham*) were in substance the same as the above reason given by the Lord Chancellor in making the order.

It does not appear whether the objection was made by the Respondent or by the House to the competency of the appeal; but the point was argued by counsel on both sides, and the following order was made by the House, *June 30, 1825*:—“ And it appearing to this House that the order complained of was not made in any cause on the Equity side of the Court of Chancery in *Ireland*, no bill being filed in this matter, but that it relates to an award made between parties upon a submission to a reference which was made a rule or

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If the rule be, as I apprehend it is, that no appeal lies to this House from a new jurisdiction established, nor from any new power grafted on an old jurisdiction, without express power of appeal, let us see whether that rule applies to this case.—[Here it was suggested by Mr. *Knight*, that one ground of argument for his clients would be, that the order which is the subject of the appeal, was not merely an order made by the Lord Chancellor, but an order of the Court of Chancery, which any Judge of that Court had authority to make.]—Can any one say, that under section 71 of the Act 5 & 6 *Will.* 4, c. 76, the Master of the Rolls, or Vice-Chancellor, or even a Lord Keeper, could pronounce any order, that section enacting, that if Parliament shall not otherwise direct on or before the 1st of *August*, the Lord High Chancellor or Lords Commissioners of the Great Seal shall make such orders as he or they shall see fit for the administration of the charities? It is simply the Lord Chancellor or the Lords Commissioners who are the persons named.

Then the question is, whether the statute 52 *G.* 3, c. 101, gives the power that has been exercised in this case. That Act clearly shows there can be no appeal to this House against an order made under a jurisdiction given by Act of Parliament, unless appeal has been directly given; for that Act recites that, “Whereas it is expedient to provide a more summary remedy in cases of breaches of trusts created for charitable purposes, &c.; be it therefore order of Court, according to an Act of the Parliament of *Ireland* passed in the 10th *W.* 3, in the judgment of this House an appeal to this House, complaining of the said order, is incompetent, and that this House hath no jurisdiction upon the matter of such appeal: and, therefore, it is ordered, &c. that the said petition and appeal be, and is hereby dismissed this House.”—(57 *Lords’ Journ.* for 1825, pp. 34, 54, and 1198).

Enacted that, &c. in every case of a breach, &c. of any trust created for charitable purposes, or whenever the direction or order of a Court of Equity shall be deemed necessary, &c., it shall be lawful for any two or more persons to present a petition to the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal, and the Master of the Rolls and the Court of Exchequer, and they are hereby required to hear such petition in a summary way, and upon affidavits, &c. to determine the same, and to make such order therein, &c. as to him or them shall seem just; and such order shall be final and conclusive, *unless* the party or parties who shall think himself or themselves aggrieved thereby shall within two years, &c. have preferred an appeal from such decision to the House of Lords, *to whom it is hereby enacted and declared that an appeal shall lie from such order.*" This enactment and declaration clearly show that the mere vesting this jurisdiction in the Courts of Chancery or Exchequer would not make their orders the subject of appeal to this House, although the object of the Act was not to create a new jurisdiction, but to give a summary procedure to the existing tribunals. The power existed before in the Court of Chancery and in the Court of Exchequer; this Act only altered the mode in which that power was to be exercised; and yet, if there was not a special declaration in the Act that there should be an appeal, there could be no appeal, because a tribunal constituted by the Legislature for a particular purpose is not to be controlled by another tribunal, when the Legislature has not expressly directed such control. Although this order is intitled in the matter of the two petitions, one of which refers to the Act 52 G. 3, c. 101, it is clear that it was made exclusively by

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virtue of the power given by the Act 5 & 6 *Will.* 4, c. 76, by which it was made necessary. If the question for decision was therefore to depend on that Act alone, it is evident there could be no authority for this House to exercise a control over the decisions which might have been pronounced, or the regulations which might have been introduced, by the jurisdiction which the Legislature has thereby created for the administration of these charities. I submit, therefore, that the order cannot of itself and by the authority of this Act be the subject of review by this House, and that it cannot be made so by reason of its being connected with the Act of 52 *G.* 3, c. 101.

Mr. *Knight*, for the Appellants:—This is an order over which your Lordships can exercise jurisdiction. It is an order drawn up—as orders in bankruptcy and in lunacy are not drawn up—by the Registrar of the Court of Chancery; it is passed and entered in the Registrar's-office of that Court, and bears the seal of that office; it is officially indorsed “In Chancery; In *re Norwich* Charities; Orders for reference to the Master;” and it begins—as all orders in Chancery begin, which are pronounced either by the Lord Chancellor or the Vice-Chancellor—by mentioning at the top the particular Judge who pronounced the order: “Lord Chancellor; *Saturday*, the 20th day of *August*,” &c.—[He read the two first titles or headings already mentioned, and proceeded:—]—The Act of 52 *Geo.* 3, c. 101, which forms the third matter of the title to this order, expressly declares that there shall be an appeal to the House of Lords, and yet it is argued that an order, appearing on the face of it to have been made under that statute, shall not come by appeal before this House. The question now is not

whether the order ought to have been made under that statute, or whether it is right or wrong, or whether there was power to make any order; that question remains for another hearing. The order is expressed to be an order under the statute 52 *G.* 3, and your Lordships, by the law of the land, have no power to decline reviewing it. That is matter the third: matter the fourth is, "and in the matter of an Act of Parliament made and passed in the fifth and sixth years of the reign of his present Majesty." The Court, therefore, which pronounced this order, has sedulously taken care to state that it is not an order made alone under the last-mentioned statute, and in the matter of certain charities, but is an order also made under the Act of 52 *Geo.* 3, c. 101, by which the jurisdiction of the Courts of Equity over charities has been heretofore exercised, and which is not repealed or grown obsolete, and which makes express provision for an appeal to this House.

What is to make this order not an order of the Court of Chancery? It is pronounced by the Lord Chancellor upon petition; his Lordship stating in the order what Court he is in; he refers it "to the Master of this Court in attendance during the vacation, to appoint proper persons," &c.; and it is therefore to all intents and purposes an order of the Court of Chancery. How it can be seriously contended that this is an order that cannot be appealed from, or that this House can take away the right of the subject to appeal against an order under the Act of 52 *Geo.* 3, because it is an order made also under another Act, it is difficult to comprehend. It may be wrong as far as it is an order under the Act of 52 *Geo.* 3, and then there is the right of appeal, which cannot be taken away merely because there are various other titles added

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in the order to the title of that Act. The points that I beg particularly to submit to your Lordships are, first, that the 71st section of the Municipal Corporations Act creates no jurisdiction at all *de novo*; secondly, that if it does create any new jurisdiction, it is only by way of a grant or addition to an old inherent jurisdiction, not creating a course of proceeding new in the law, but merely an additional head to an ancient and known tribunal, and regulated therefore by the ancient and known course of proceeding; just as if it were enacted that, for a certain matter not heretofore according to the course of the law of the country, a new head of equity relief should be had in the Court of Chancery; a new power added to an existing tribunal, to be exercised according to the laws which regulate that tribunal. But thirdly, if a new jurisdiction were created in the manner that has been contended for, there is nothing in the Act 5 & 6 Will. 4 to exclude the old jurisdiction; if there be in any sense a new jurisdiction given, it is cumulative, and not exclusive.

The consequence of holding that this House is to exercise no jurisdiction, and that the Lord Chancellor, or the Lords Commissioners of the Great Seal for the time being, are to exercise absolutely and without control the power given by the Act 5 & 6 Will. 4, is so fearful in its extent and character as to induce any man to pause before he admits such a doctrine; for the Act extends to all the charities vested in all the corporations, or individual members of corporations, throughout the kingdom, except *London*. The tendency of the argument on the other side, is to withdraw from the general administration of the law the vast amount of property which is included in those charities; to withdraw all this from

the jurisdiction of the House of Lords, and vest an absolute and uncontrolled power over it in a single Judge. That it would be a wholesome or a reasonable interpretation of this Act to hold that that was its object, cannot be admitted. What the Act meant and effected was, that if Parliament did not interfere, the Judge having the ordinary cognizance of charity matters should interfere in the usual way. At the time when the Act passed, the Lord Chancellor was constantly exercising jurisdiction upon petition under the statute of 52 *Geo. 3*: trusts and charities had long before been subjects of administration in the Court of Chancery. This Act (of 5 & 6 *Will. 4*) did not give the Lord Chancellor a power over any matter that was new to him; but, giving a particular direction that was to be in force for a certain time, it enacted that after that time the Judge who had jurisdiction over such matter should exercise it. It would be a most inconvenient, if not absurd, interpretation of this Act, to hold that it created a new jurisdiction when there was no necessity for creating one, and to deny that it referred to a jurisdiction already existing, when it may be clearly held so to refer; especially when the former interpretation would have the consequence of excluding an appeal from decisions over property in value amounting to millions, involving questions probably of the greatest difficulty; for every matter relating to those charities must be included under the words "administration, subject to such charitable uses or trusts as aforesaid, of such trust estates."

Blackstone, in speaking of the Court of Chancery, says, "An appeal to Parliament, that is, to the House of Lords, is the dernier resort of the subject who thinks himself aggrieved by an interlocutory order

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or final determination in this Court, &c. This jurisdiction is said to have begun in 18 *Jac.* 1, &c. It was afterwards warmly controverted by the House of Commons in the reign of *Chas.* 2. But this dispute is now at rest; it being obvious to the reason of all mankind, that when the Courts of Equity became principal tribunals for deciding causes of property, a revision of their decrees, by way of appeal, became equally necessary as a writ of error from the judgment of a Court of Law. And upon the same principle, from decrees of the Chancellor relating to the Commissioners for the dissolution of Chauntries, &c. under the statute 37 *Hen.* 8, c. 4, as well as for Charitable Uses under the statute 43 *Eliz.* c. 4, an appeal to the King in Parliament was always unquestionably allowed (*h*).” Now in those two statutes there is no mention of any appeal to the House of Lords; but as they gave a jurisdiction to be exercised by an Equity Judge, it follows as matter of course that an appeal lies from him to this House. “By statute 43 *Eliz.*” (which is the one more frequently acted upon—the other being obsolete in practice), “authority is given,” *Blackstone* says (*i*), “to the Lord Chancellor or Lord Keeper, and to the Chancellor of the Duchy of *Lancaster* respectively, to grant commissions under their several seals to inquire into any abuses of charitable donations, and to rectify the same by decree, which may be reviewed in the respective Courts of the several Chancellors. But though this is done in the Petty-bag Office, &c. because the commission is returned there, it is not a proceeding at common law, but treated as an original cause in the Court of Equity, &c. And as it is thus considered as an original cause throughout, an appeal lies, of course,

(*h*) 3 Black. Comm. 454 (15 ed).

(*i*) Id. 428.

from the Chancellor's decree to the House of Peers, notwithstanding any loose opinions to the contrary." And for the right of appeal, *Blackstone* cites *Duke on Charitable Uses*, pp. 62 & 128; and for the loose opinions to the contrary, 2 *Vernon*, 118. But there is a direct decision of this House on the point, in *Warner v. North (j)*.

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The appeal from the Courts of Chancery and Exchequer in equity is not founded upon any Act of Parliament, but upon the reason and necessity of the thing. Appeals to this House from the *Welsh* Courts of Equity were frequent and familiar to your Lordships. They came direct from the Courts in *Wales*, not through the Court of Chancery; and no doubt was ever suggested as to the jurisdiction, although the Act of *Hen. 8*, constituting those Courts, gives no appeal in express terms. Suppose, on a mistaken construction of one of the recent Acts of Parliament enlarging the powers of the Court of Chancery in respect of procedure, that Court was to exercise a jurisdiction by petition which did not belong to it—as, for instance, under one of Sir *E. Sugden's* Acts, to appoint a new trustee by petition in a case not warranted by the Act; or, suppose it took upon itself, under the same Act, to take from a mortgagee or trustee the legal estates—such orders, if not pronounced with the greatest caution, might produce ruin to families; and is it to be said that there can be no appeal to the House of Lords from such orders, because they are pronounced upon petition and not upon bill? The question is, whether the Court of Chancery assumes to do an act which does not come within its jurisdiction: if it does, an appeal lies, though the only ground of appeal may be that the order ought to have been by bill and not by petition,

(j) Shower's P. C. 110.

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and that the Court was exceeding its jurisdiction. In none of these new Acts of Parliament has it been thought necessary to give expressly an appeal to the House of Lords, because the subject-matter was a matter of equitable cognizance, which Courts of Equity had been dealing with for centuries; and when their powers were intended to be extended, that extension of power was construed as given to them in that character and capacity, and liable to all those considerations and consequences which are incidental to that character and capacity.

The case of *Lord Wharton v. Squire* (*k*), whatever may be said of the dispute between the two Houses of Parliament at that time, stands as a precedent that a general order of a Court of Equity, though not made in any cause, is a proper subject of appeal by a person who is aggrieved by it. The Court of Exchequer had in that case made an order dealing with a particular record; that order was appealed against, and the House of Lords varied the order and asserted its appellate jurisdiction. In *Bailey v. Maule*, mentioned in a note to *O'Neil v. Fitzgerald* (*l*), the purchaser of an estate, who was no party to the cause, appealed from the order made in that case, and this House received the appeal, and affirmed Lord *Eldon's* order. Of *O'Sullivan v. Hutchins*, which is also mentioned in a note to *O'Neil v. Fitzgerald*, the merits cannot be collected from that note (*m*). The case of *Wall or Hoare and others v. Attorney-general*, depended on different principles. The order in that case was an order made under a special statutory jurisdiction, given to the Court of Exchequer for the purpose of dealing with extents. It was a new jurisdiction created for the

(*k*) Colles, 276. See also 11 Price, 669-672, 17 Lords' J. 277, and 8 Harg. State Trials, 175.

(*l*) 3 Bligh, 54.

(*m*) *Sed vide ante*, p. 85.

particular purpose. This House appears to have held that from orders made in that particular form of jurisdiction, they ought not to entertain appeals; and the reasons are suggested in argument by Sir *A. Hart*, speaking as counsel in the case of *O'Neil v. Fitzgerald*. In that case the jurisdiction of this House over an order of the Court of Exchequer in *Ireland*, no cause pending, appears to have been exercised, as it had been in *Lord Wharton v. Squire*, and in *Bailey v. Maule*.—(57 Lords' J. for 1825, p. 737.)

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The jurisdiction in bankruptcy stands upon peculiar grounds. That jurisdiction is neither legal nor equitable; it is partly both; it was entirely a new jurisdiction unknown to the law of the country; it grew up from the control which the Judge who held the Great Seal had over his own proceedings: as he issued the commissions, he might control the Commissioners who resorted to him for advice and assistance. No proceeding in bankruptcy was ever intitled, "In Chancery." The officers of that Court have nothing to do with bankruptcy. The Lord Chancellor has a particular set of officers appropriated to that business.

The jurisdiction in lunacy depends upon another principle. That matter is the King's personal jurisdiction. He appoints a particular deputy to exercise that jurisdiction for him, who may be the Lord Chancellor or anybody else. If the deputy for that particular purpose does an act in the execution of his duty, which the subject complains of, he comes to the King, who is supposed to be in person in the Privy Council hearing any complaint in lunacy which belongs to his own domestic administration of the lunatic's estate. That is the course of appeal prescribed by the law of the country, giving the King as the ultimate resort, instead of the House of Lords; and no order in lunacy is intitled, "In Chancery." Orders

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in lunacy are drawn up in a different branch of the Court, and by a different set of officers. (See note A to *Sheldon v. Fortescue Aland*, 3 P. Wms. 106.)

But suppose this Act (5 & 6 Will. 4) has given a new jurisdiction to the Lord Chancellor, is there any clause in it to exclude his ordinary jurisdiction? Where are the words of exclusion? The mere circumstance of giving power, if the power is given, to the Lord Chancellor, as an individual, would not shut out the ancient power of the Court of Chancery. Had not that Court power, before this Act, to interfere for the administration of charitable trusts? If your Lordships yield to the argument on the other side, you must not only hold that the words of the proviso in this Act create a new jurisdiction in the individual named, without an appeal, but also an exclusive jurisdiction, so that no Court of Equity shall deal with a matter of charity, where members of a corporate body are trustees. For if the jurisdiction be not exclusive, then the Court of Chancery has in this matter made an order according to its ancient powers; and if it has not done so according to its ancient powers, it may or may not have exceeded those powers; but that is the matter to be considered in the appeal. If the words of the Act create a new jurisdiction, which it is submitted they do not, but do not create a jurisdiction exclusive, then this order is an order made by the Court of Chancery in the exercise or assumed exercise of an ancient jurisdiction on which your Lordships have a right to interfere.

An argument has been raised on the words used in the Act 52 Geo. 3, c. 101, giving an appeal to this House. The recital in the Act rendered it necessary to mention the House of Lords, because of the limitation of time to give effect to the orders; and the House of Lords being mentioned, the words "to whom it is

hereby enacted and declared that an appeal shall lie from such order," are thrown in by way of parenthesis. The words "enacted and declared" are always considered as importing that the Legislature was providing for something that was not provided for by the existing law; such as the summary proceeding given for the first time by that Act in administering charities.

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But without the words granting an appeal, an appeal would lie; and it may well be contended that if an Act of Parliament were to create a new Court of Equity, without a word about an appeal, as a matter of course an appeal would lie to this House; and unless that were so, your Lordships have been for centuries hearing equity appeals without authority. Where was the right to hear the first equity appeal, if not in the inherent jurisdiction of this House as the Supreme Court of Equity of the country? It heard appeals from the Court of Chancery, and from the Court of Exchequer, because they are equitable jurisdictions. It heard them from the Courts of Great Session in *Wales*, because it was an equitable jurisdiction. Where is that authority derived from but from this, that it is the common-law of the country that this House, as the Supreme Court of Equity in the kingdom, decides by its inherent powers in the last resort? Suppose the four last lines in the 71st section of the Municipal Corporations Act did not exist at all, would any man entertain a doubt that the Lord Chancellor would have had power to direct references to the Master to appoint new trustees, if a case required it; or, if he had done it without bill or without reference, then that though it might have been complained of, still it would have been the act of the Lord Chancellor in the Court of Chancery, dealing with a matter of

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equitable jurisdiction? It is clear that all that was meant by these words, was to throw the administration of the charities into the same course as it stood before, if Parliament did not interfere before a given day.

Mr. *Pemberton*, in reply :—The argument urged with most confidence for the exercise of the appellate jurisdiction of the House in this matter is, that the petitions, affidavits, and the order itself, are intitled “ In Chancery, and In the matter of the Act of 52 *Geo.* 3, c. 101,” and the order is drawn up by the Registrar of the Court of Chancery, and that all the proceedings are treated by the petitioners as if they were proceedings in that Court under its ordinary jurisdiction. Can the error or the consent of the petitioners, in intitling their petitions and affidavits, give an appeal to this House from a new jurisdiction created by Act of Parliament, if the Legislature has not conferred it? What can it signify how the petitions and the order are intitled, or in what terms that order speaks, if it was made by the Lord Chancellor under the authority of the statute which makes what he has so ordered conclusive on the parties? The order was made, as it purported to have been made, by virtue of the power conferred on the Lord Chancellor by the 71st section of the Act 5 & 6 *Will.* 4, c. 76. If it was the intention of the Legislature, in annihilating all the interest of the corporation trustees in charities from the 1st of *August* 1836, to leave the estates of which they were trustees to be administered by the existing tribunals by their ancient jurisdiction, what was the object of introducing the special proviso, that if Parliament should not otherwise direct on or before that day, the Lord Chancellor or Lords Commissioners of the Great

Seal should make such orders as he or they should see fit for their administration? That proviso would be quite nugatory if it was not intended to confer a new jurisdiction on the persons there named.

The argument for the competency of the appeal has been carried to this extent,—that this House has authority to review, by way of appeal, the orders of every jurisdiction established by Act of Parliament, unless the Legislature has expressly excluded the right of appeal. My learned friend and I are at issue on that point: I say no such authority exists in your Lordships' House, unless the Act creating the new jurisdiction, or some other Act, gives it; while Mr. *Knight* contends that such authority does exist, unless expressly excluded. The jurisdiction in bankruptcy, created and continued by numerous Acts of Parliament, has been exercised by the Lord Chancellor, Lords Commissioners, and other Judges of the Court of Chancery, but no appeal lay to this House from any orders in bankruptcy; and the reason is, that it was a special jurisdiction created by Acts of Parliament, which did not give an appeal to this House.

It does not appear distinctly from the references made in the passages cited from *Blackstone's Commentaries*, that an appeal ever lay to this House from sentences by the Delegates, nor from decrees on the statute for Charitable Uses, 43 *Eliz.*, c. 4; and the reason given in *Saul v. Wilson* (the case in 2 Vernon 118) is, "because those matters are grounded upon Acts of Parliament, and the Acts give no appeal." The authority on which *Blackstone* calls that "a loose opinion," does not appear in *Duke's Charitable Uses*, to which he refers (*n*). The decision of

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(*n*) *The Almsmen of Eastham v. Lady Kempe*, must be the case to which the reference is made by *Blackstone*; it is mentioned in

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the House in the case of *Wall v. The Attorney-general*, before referred to, is conclusive on the question in this

the report of *Windsor v. Hilton*, in p. 62 of the old edition of *Duke*. From the entries in the Lords' Journals for 1643-4 (19 & 20 *Car.* 1), we collect this state of that case :—An order was made on the 2d of *December* 1643 to summon witnesses before the House at the hearing of the cause of the Poor of *Eastham* and the *Lady Kempe*; and on the 9th, counsel were heard on both sides, and the certificate of Sir *John Bramston*, then late Lord Chief Justice, was read, by which he had certified in *August* 1641 that, in pursuance of their Lordships' order of the 5th of *June* of that year, he had heard the grievances mentioned in the petition of the almsmen of *Eastham*, in the county of *Essex*, in the presence of their counsel, and he found the case to be as follows :—*Giles Breame*, by his will, dated 1st of *May*, 16 *Jac.* 1, appointed that six houses should be built for six poor men of the parish of *Eastham*, within a year after his decease; and he devised divers lands in *Eastham* towards their maintenance for ever, and made Sir *Giles Allington* his executor, and gave him and his heirs the manor of *Eastham*, that he might have wherewithal to perform his will, &c. That Mr. *Breame* afterwards made a codicil, by which he entreated Sir *G. Allington* to purchase 40 *l.* a-year in soccage tenure for the maintenance of the six poor men in the almshouses, and to let that land which he had bequeathed by his will for that intent remain still unto the lordship, as it hath been. That the houses were built by Sir *G. Allington*, but before any lands of 40 *l.* yearly value were purchased, he sold the manor and lands in *Eastham* to *Lady Kempe*, and left 660 *l.* in her hands for the purchase of the lands of the yearly value of 40 *l.*; and it was agreed between him and her that until such lands should be purchased, the said lands in *Eastham* should stand charged with the charitable use. That no such lands were purchased for many years; but there being a decree made by the Commissioners for Charitable Uses, and exceptions taken thereto before the Lord Keeper *Coven-try*, he decreed that 800 *l.* should be paid by the *Lady Kempe* and Sir *G. Allington* to feoffees, towards the purchase of lands to the use of the almsmen; which 800 *l.* had been since laid out in the purchase of lands in *Braintree*, more than 30 miles from the almshouses: and whether the almsmen might have the lands in *Eastham* under the will, or accept the lands in *Braintree*, of less value and more distant, was the question for the judgment and direction of the House.

On the 11th *December* 1643, the House ordered that it be referred to all the Judges and King's Counsel to consider whether, by the statute of Charitable Uses, a decree made by the Lord Keeper in Chancery is, by virtue of that statute, not reversable in the High Court of Parliament but by a statute made for that purpose, more than any other decree made in Chancery.

On the 15th *April* 1644, the Judges reported to the House that they heard counsel on either side in the said cause, and considered

case, and to admit this appeal will, in effect, be to overrule that decision. For the facts and result of the case of *Warner v. North*, it would be right to direct a search in the Journals (o).

The *Lord Chancellor*:—My Lords, when this case came before the Appeal Committee, it was found to

the question on the statute of 43 *Eliz.* for Charitable Uses; and they certified their opinion to be, “that upon an appeal to the Lord Keeper upon that statute, and a decree made by his Lordship in Chancery, annulling, diminishing, altering or enlarging a decree made by Commissioners by virtue of a commission upon that statute, if the same decree so made by his Lordship do not stand with equity and good conscience according to the true intent and meaning of the donors and founders, that the same may, notwithstanding anything contained in that statute, be reversed in Parliament, in such course and manner as any other decree made in the Court of Chancery may be by course of Parliament reversed. Signed *Thos. Irwin, Edm. Reve, Fra. Bacon, Ralph Whitfield.*”

On the 10th of *August* 1644, the House heard “the cause, by counsel on both sides, between the Poor of *Eastham* and the Lady *Kempe*,” concerning a reversal of the decree made by the Lord Keeper *Coventry*, in Chancery, touching land of the value of 40*l.* per annum, given by will of *Giles Breame* to the said Poor of *Eastham*, which land is pretended to be passed away to the Lady *Kempe*, and other lands settled to a smaller value; and the House taking this business into consideration, ordered that the said cause shall be dismissed this House.”

(o) *Lee Warner v. William North*. There is a short report of this case in *Shower*, p. 110. It appears from entries in the Lords’ Journals for 1693 (6 *W. & M.*), that *Warner* presented a petition of appeal, complaining of a decree made by the Commissioners for Charitable Uses, and of a confirmation thereof by the Court of Chancery in 1692, upon overruling his exceptions with costs to be paid by him to *North*. That appeal was withdrawn. In 1695 *Warner* again appealed to the House, complaining of a decree made *Nov.* 1693, on behalf of *North*, and another decree on behalf of *Grace Featly* and other widows of *Bromley College*; and praying that a decree made by the Commissioners for Charitable Uses might be confirmed, and that the decrees, orders, and proceedings in Chancery, altering the same, might be reversed. The entry of the judgment on the 3d of *March* 1695, is this:

“Upon hearing counsel this day at the bar, upon the petition and appeal of *Lee Warner*, gentleman, complaining of a decree made in the Court of Chancery the 24th day of *November* 1693, on the behalf of *William North*, and another decree made on behalf of *Grace*

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raise a question evidently of so much importance, not only to the parties, but as affecting a great many other cases which might arise under the proceedings of this Act of 1835, that it was thought not proper to dispose of it in that Committee, but to refer the parties to the bar of the House; and in order to save them the expense of preparing their cases and making ready for hearing on the merits, they were permitted to apply by petition, for the purpose of raising at the bar the question that was presented to the Committee of Appeals. The case, as it appears upon the petition now before your Lordships, states the order, which is undoubtedly intitled "in Chancery," and has been so argued at your Lordships' bar. It was an order on petitions, one of which was presented by the parties now asking to have the appeal dismissed; and that petition is intitled, not only in the matter of the Act of the 5th & 6th of the King, but it is also intitled in the matter of the Act of 52 *Geo.* 3, Sir *Samuel Romilly's* Act. The order is drawn up as an order of the Court of Chancery, and the reference is made to one of the Masters of the Court, and the further directions are reserved to that Court. Upon the face of the order, therefore, it is an order in the recent Act of the 5th & 6th of the King; it is an order in the matter of the 52d of *Geo.* 3, and it is, as it would be if it were an order in

Featly and the other widows of *Bromley* College, and praying that a decree made by the Commissioners of Charitable Uses may be confirmed, and that the decrees, orders, and proceedings in Chancery may be reversed; as also upon the several answers of *William North*, gentleman, and *Grace Featly*, widow, on behalf of herself and the other widows of *Bromley* College, in the county of *Kent*, put in thereunto: after due consideration of what was offered thereupon, it is *ordered* and *adjudged* by the Lords, &c., that the said petition and appeal of *Lee Warner* shall be and is hereby dismissed this House; and that the decrees, orders, and proceedings of the Court of Chancery therein complained of, shall be, and they are hereby affirmed."--(15 Lords' Jour. for 1695, p. 691.)

the 52d of *Geo.* 3, an order of the Court of Chancery ; but it will not be an order of the Court of Chancery if the argument on the part of the parties asking to have this appeal dismissed as incompetent be correct, because that argument supposes that the reference by the 71st clause of the Act, 5 & 6 *Will.* 4, is not made to the Court of Chancery as a Court of Equity, but to the individual who for the time being may hold the Great Seal. Now your Lordships have not the merits of this case before you to discuss ; your Lordships have simply to consider whether upon this state of things, as it appears upon this petition, and as appears upon the face of the order, your Lordships can say that the parties have a right to come to this House. If what is complained of be a matter done under the authority of the 52d of *Geo.* 3, they unquestionably have a right to come to this House ; if it be generally the order of the Court of Chancery, they have a right to come to this House. But it is contended that if it is an order made under the authority of the 71st section of the 5th & 6th of the present King, then they have no right to come to this House. If the case were now before us in a stage which would enable us to decide on that latter question, it might be one of considerable difficulty and requiring much consideration ; but the parties who now come to your Lordships' bar ask your Lordships to decide that the Respondents here, the Appellants in the general appeal, are not to be heard to complain of the order, the order being intitled under Sir *Samuel Romilly's* Act, the 52d *Geo.* 3, under which Act there is an express power of appeal to this House. What your Lordships have to consider is, whether in this state of circumstances you can safely decide that the parties appealing, the order being upon the two petitions, are not entitled to

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be heard at your Lordships' bar. We have not the merits of the case before us now; but under the circumstances now appearing on this petition, it does not appear to me that we can safely decide. These petitioners are not the parties appellant: it does not appear to me that there is on the face of this petition any reason to show that we can dismiss the appeal on the ground of the House not having jurisdiction.

Lord *Brougham*:—I entirely agree with my noble and learned friend that there is not ground whereupon we can dismiss the petition of appeal, and refuse to go into the case. It is quite unnecessary to go further than to state that that is sufficient to dispose of the present application to dismiss the appeal. My opinion clearly is that this appeal from that order of the Court of Chancery is competent. With respect to what is said of the Act of the 52d *Geo.* 3d, it is unnecessary to go into the construction of that Act, or into any inferences which may be drawn from the peculiarity of the saving clause in the first section of that Act; but I certainly incline to the opinion that that saving clause has been introduced in consequence, not merely of the summary jurisdiction, but in consideration of the statutory limitation there given of two years; by which alone I can account for the reservation of the appellate jurisdiction appearing as it does there.

Petition to discharge the appeal as incompetent, refused, without costs, and the appeal sustained.

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The appeal stood over until the session of 1839, when it came to be heard in the presence of the Judges.

Mr. *Knight Bruce* and Mr. *Jacob* (Mr. *Girdlestone* was with them), for the Appellants:—The Lord Chan-

cellor's order directed a reference to the Master of the Court in attendance during the vacation, to appoint proper persons to be trustees of the charity estates and property late under the administration of the corporation of *Norwich* or any of its members in that character, which were affected by the 71st section of the Act 5 & 6 *Will.* 4, c. 76. The first and principal objection to the order is, that the trusts of the charity estates were not vacant when the order was made. The next objection is, that if the trusts were determined by force of the statute, the order should be to refer it to the Master to inquire whether the same persons who were the trustees up to that time were not proper persons to be continued as trustees for the administration of the charity estates and property. If either of these objections can be sustained, the order cannot stand.

The corporate bodies, or some of the persons composing them, were trustees of the charity estates and property, like individuals, before the passing of the Municipal Corporations Act, the object of which was to extend corporate privileges to the inhabitant householders of the several cities and boroughs, and to introduce a new mode of electing members of the governing bodies, in place of the then existing governing bodies who were to go out of office on a fixed day. The 71st section of the Act, on which the House is required to put a construction, purports to provide for the future administration of the estates and funds, of which the corporate bodies, or some of their members in their corporate characters, were trustees for charitable purposes. The words of the section are, "all the estate, right, interest and title, and all the powers of such corporate body, or of such member or members

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of such body corporate, in respect of the said uses and trusts, shall continue in the persons who at the time of the passing of this Act are such trustees as aforesaid, notwithstanding that they may have ceased to hold any office by virtue of which before the passing of this Act they were such trustees, until the 1st day of *August 1836 or until Parliament shall otherwise direct*, and shall thereupon utterly cease and determine." The first word in that part of the section requiring particular consideration is the word "continue," which neither expresses nor implies the appointment of new trustees, but quite the reverse, enjoining, in fact, the continuance of the former trustees. The subsequent words of the section point out a limit to their continuance in the trust, namely, "until the 1st day of *August 1836 or until Parliament shall otherwise order*." These words must be read together in giving a true construction to them: the 1st of *August* could not of itself terminate the continuance of the trusts; they were to continue until Parliament passed another Act, and thereupon utterly to cease and determine. The interpretation put on the clause by the Lord Chancellor in making the order was, that the trusts utterly ceased on the 1st of *August*, whether Parliament interfered or not by any other Act. The Appellants submit that that cannot be the true construction of the words. The words "thereupon," &c. must be taken to refer to the last antecedent "until Parliament shall otherwise order," or to both antecedents; and if to both, then the Lord Chancellor's construction referring them to the remote antecedent only, "the 1st day of *August*," must be wrong. The Legislature could not have intended to put an end to these trusts before it made provision for the

administration of the charities. If the trusts were all vacant on the 1st of *August*, according to the Lord Chancellor's view of the Act, what became of the estates and property from that day until his Lordship made orders for appointing trustees to the *hæreditas jacens*? What became of the trusts in the mean time? They must have remained wherever the legal estate was, and where that is even now is *vexata quæstio*. Some persons suppose the legal estate remains in the old trustees; some suppose it is vested in the Lord Chancellor and Masters in Chancery; and some say in the heirs of the donors, from *Cumberland* to *Cornwall*. A trustee is a person who has the legal estate or interest. The Lord Chancellor's order did not divest that estate out of the former trustees, or give it to those appointed under his orders. Without the legal estate they cannot be trustees; they are mere scarecrows, having no real authority to protect the estates. Suppose a tenant of any of the charities refuses to pay rent, or resists a notice to quit, where is the power in the trustees to distrain or to eject him? There is, in fact, no person in *rerum natura* who has the legal estate, or who could sue a tenant of the charity estates as lessor of the plaintiff, if the trusts in the corporations ceased on the 1st of *August* 1836. That day was not the termination at which the clause aimed, but that day was named because it was anticipated that Parliament would make other provision before that day, and such other provision by Parliament, whenever it should happen, was the limitation intended; but in the event of no provision being made before that day, the Lord Chancellor's ordinary jurisdiction over charities was to be exercised in the usual way. The trustees were not free from control in case Parliament did not interfere;

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for in that event they were subject to the Lord Chancellor's former jurisdiction, whereby he might remove any of them who misconducted himself, or became incapable or unwilling to act. And that it was no new jurisdiction that was to be exercised by the Lord Chancellor was clearly indicated by the words of the first proviso: "That if any vacancy shall be occasioned among the charitable trustees for any borough before the 1st day of *August*, it shall be lawful for the Lord High Chancellor, &c., upon petition in a summary way," (the exact words of the Act of 52 *Geo.* 3, c. 101) "to appoint another trustee to supply such vacancy," &c. And in like manner the existing jurisdiction was to be put in motion by the second proviso in the clause: "If Parliament shall not otherwise direct on or before the said 1st day of *August* 1836, the Lord High Chancellor or Lords Commissioners of the Great Seal shall make such orders as he or they shall see fit for the administration, subject to such charitable uses or trusts as aforesaid, of such trust estates." The Lord Chancellor's general jurisdiction over charities, until Parliament should pass an Act for their regulation, was to be exercised to provide against malversation of the trustees, reduction of them by death or incapacity; so that by that interpretation of this section no mischief could ensue from the continuance of the estates in the former trustees. But great mischief might ensue from the other interpretation, by which the trusts of these estates became vacant, and the whole of this vast property was unprotected from the 1st of *August* until trustees should be appointed by the slow process of petitions to the Court, orders of reference thereon, and then the tedious squabbles in the Master's office, with consequent applications to the Court. The Legislature could not

have intended so dangerous a proceeding ; and to prevent so much mischief the statute ought to receive a reasonable construction, not inconsistent with the words, though not resting on the letter only ; *nam qui hæret in littera hæret in cortice*, but relying on the sense guided by equity ; *Fulmerston v. Steward*, and *Stradling v. Morgan* (q). In the case of *The King v. The Inhabitants of Everdon*, Lord *Ellenborough* says (r), “ I hope that the apparent justice of the one construction, and the great and manifest inconvenience of the other, do not too much warp my mind in coming to the conclusion which I have done : for it would indeed be a grievous construction if we were to be bound to adopt the literal sense of the words of the statute.” And in *The King v. Bellamy* (s), Chief Justice *Abbott* says, “ The language of the Acts, &c. is not free from obscurity : it is our duty, however, to give effect to the intention of the Legislature, if that can be ascertained.”

If the word “ or,” in the clause “ until the 1st day of *August* 1836 or until Parliament shall otherwise direct,” were to be read “ and,” there would be no difficulty at all in reconciling the words to the manifest intention ; and there are cases (more on the construction of deeds and wills than of Acts of Parliament) where “ or ” is construed to mean “ and,” in order to effectuate the intention, and where the sense and reason require such reading to avoid inconvenience ; *Fairfield v. Morgan* (t), *Wright v. Kemp* (u). The form used in injunctions is similar, viz. “ until answer or further

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(q) Plow. pp. 109. 205. See also *Butler and Baker's Case*, 3 Co. Rep.; Co. Litt. 381 a. and 381 b.; Bac. Ab. tit. Statute; Rules to be observed in the construction of a Statute; and 1 Blacks. Com. 91.

(r) 9 East, 105.

(s) 1 Barn. & C. 502.

(t) 2 Bos. & P. 38.

(u) 3 T. Rep. 470.

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order," by which the party is prevented from doing what is forbidden, until further order: it is not enough "until answer;" the injunction continues after answer until further order of the Court. As in that form the first words, "until answer," so in this clause the words "until the 1st day of *August*," go for nothing; and the second period of the clause, "until Parliament shall otherwise direct," is to be taken as the termination of the trusts intended by the Legislature.

But supposing that these trusts did all become vacant on the 1st of *August* 1836, the Appellants submit that this was not a proper order of reference. The former trustees, whose conduct and management of the charities were unimpeached, ought to be left at liberty to propose themselves for re-appointment. It was not proved nor alleged that they had failed to administer the charity estates and property according to the uses and trusts to which they were subject, or committed any breach of trust, or were unfit to continue trustees. They had the legal estate, which was not divested by the Act. The order of reference for appointing new trustees did not clothe those so appointed with the legal estate, or give them power to effect the objects of the trusts; they were mere phantoms. The legal estate should have been ascertained and declared before they were appointed; the title-deeds of the estates should have been in their possession. Even to this day these trustees are without any power to protect the charity estates and funds.

The *Attorney-general* and Mr. *Pemberton* (Mr. *Blunt* was with them), for the Respondents:—By the plain construction of the 71st section of the Municipal Corporations Act, all the estate and interest of the trustees of the charity property were determined on the

1st of *August* 1836. At the time of passing the Act, the danger of leaving the charities to be administered by the same hands that would have the management of the Borough fund was clearly foreseen and provided against: first, in case of vacancies happening in the trusts before Parliament made the then intended provision for their future administration, the Lord Chancellor was empowered to fill them up; and, secondly, in case Parliament should not make such provision on or before the 1st of *August* (the event which happened), the Lord Chancellor was to make orders for their administration. The first proviso, giving power to the Lord Chancellor to fill up vacancies in the trusts, gave no more than the Great Seal possessed before by virtue of office, without any legislative enactments; but it limited the continuance of the persons appointed to the vacancies in the trusts to the 1st of *August* 1836, the time when the persons in whose room they might be chosen would have ceased to be trustees. The second proviso, which the Appellants would, by their construction, strike out of the section altogether, conferred an enlarged jurisdiction on the Lord Chancellor.

The argument for the continuance of the trustees beyond the 1st of *August* 1836, is founded on the words, "or until Parliament shall otherwise direct." These words do not extend the period for the termination of the trusts beyond the 1st of *August*, but limit the time still stronger, giving the trustees notice that the 1st of *August*, at all events, would be their last day in office, but that it might cease sooner by the direction of Parliament. The use of the words was most appropriate to apprise the trustees that before the 1st of *August* another Act might pass for administering the charities. The trustees would have a right to

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complain if they had not such notice ; for they had valuable privileges and patronage, and they might say that there was a violation of their vested rights, if the time when they were to cease was not limited. The word “continue,” it has been contended, is to be taken in an extending sense; certainly it was so meant; that is, to continue until the 1st of *August*. But whatever interpretation may be given to that word by itself, the words of the last proviso leave no room to doubt that the 1st of *August* was the final termination of the office of these trustees, if it was not terminated sooner by direction of Parliament. It is also suggested that “or” may be construed “and,” by which construction the trusts were not to cease “until Parliament otherwise directed :” such a substitution of the one word for the other would destroy the plain sense of the clause in this case, and it should never be resorted to in any case without the utmost necessity ; *Price v. Hunt* (x), *Duncomb v. Walter* (y), *Hall v. Gaun* (z).

The grievance complained of by the Appellants is that the Lord Chancellor directed the appointment of new trustees before the former trustees were removed ; and they insist that the offices ought to be first declared vacant. But the trustees were removed on the 1st of *August*, by virtue of the Act of Parliament ; it was superfluous to declare the office vacant. The Lord Chancellor’s order recites the clause of the 71st section, showing that the trustees were no longer in office. It is implied in the argument for the Appellants that the Lord Chancellor might, independently of this Act, remove the trustees. Then it may be asked whether his power is lessened by this section, which gives him new power ? If the Secretary of State were the person appointed to exercise that power,

(x) Pollexf. 645.

(y) 2 Lev. 57.

(z) Cro. Eli. 307.

instead of the Lord Chancellor, can it be contended that he would not be thereby authorised to appoint new trustees after the 1st of *August*? Is this clause to be struck out because the Lord Chancellor is the person named; and he had already power by virtue of his office? It is alleged that the new trustees have not the legal estate, and therefore cannot effectually exercise their trusts. It is true they have not the legal estate, but they are nevertheless able to act as trustees. It is given as a reason that Mr. *Dunning* could not be the author of *Junius's* letters, because *Junius* in his dedication used the expression, "They," (the King, Lords and Commons), "are the trustees, not the owners; the fee simple is in us:" which certainly, for a lawyer, is not a correct expression. But there are many classes of persons in the character of trustees, and acting with all the power of trustees, without the legal estate. There are the trustees of the British Museum, for instance, who manage, direct and control that establishment, but have not the legal estate, which remains in the body corporate of that institution.

It may be admitted that all the bodies corporate, and all their members who were trustees of these charities up to the 1st of *August* 1836, were immaculate and wholly unimpeachable in their administration of the charity property; but how were they in a situation to discharge their duty after the new composition of the corporations? The whole of the corporation of *Norwich*, consisting of 85 individuals, administered the charities in that city as trustees in their corporate capacity: were the 85 individuals to continue in the trusts after they or some of them ceased to be corporators? or was the new corporation, consisting of several thousand persons, to administer the charities? They might

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become bankrupts, go reside abroad or at a distance at home, or perhaps be sent out of the country: acting in their natural capacity, how could they all agree to any act, whether of bringing an ejectment against a tenant, employing a bailiff to distrain, granting a lease, or giving a receipt for the rent? They are no longer corporators doing these matters by their common seal. They would be in the nature of joint tenants, the charities continuing in them in their natural capacity after they ceased to be corporators; and to give validity to any act, they should all join. Any one of them dissenting from the others might give a release to a debtor to the charity. All these circumstances show the great inconvenience that would result from the course which the Appellants would follow. What is the inconvenience of the course which has been taken? There was a reference to the Master in the case of every corporation, and the Master devoted his attention to the subject; so that the change was effected in the most convenient manner for all parties, especially for the charities and the objects of them. The corporation trustees being *functi officio* on the 1st of *August* 1836, on which day their interest ceased and the trusts became vacant, the legal estate having been in the old corporation, and the new corporation being a continuation of the old, that estate fell in on that day; the lease, as it were, expiring, the reversioner becomes seised, and from that day the reversion and the legal estate are in the new corporation. It was certainly a mistake not to have given the Lord Chancellor power to vest the legal estate in the new trustees. It was not contemplated at the time that he could not so vest it. The error was seen and corrected in the Irish Municipal Corporations Act,

and it certainly is an inconvenience which the Legislature ought speedily to remedy. But it signifies little, compared with the mischiefs that would result from the construction put on the Act by the Appellants. The corporation of *Norwich* consists of 3,000 members, besides the governing body; and the legal estate is in the whole corporation, who certainly could not act together as trustees of these charities. If their Lordships would for a moment consider the enormous evils that would follow from the re-transfer of these charities from the new trustees to those who before had the management of them, surely nothing would induce their Lordships to such a step, unless they thought the language of the Act imperatively required it. From the first clause of the Act to the last, it appears that every officer of the corporation was wholly divested of every power which had been vested in him. Were the charity trustees alone to be continued until Parliament passed another Act? The effect of the 71st section, it is submitted, was, that all the estate and interest of the corporation trustees ceased on the 1st of *August* 1836; and there being then no trustees by whom the charities could be administered, the defect could only be supplied by means of the authority of the Lord Chancellor, under the last proviso of that section, or of the Court of Chancery or Court of Exchequer, under the Act 52 *Geo.* 3, c. 101.

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Mr. *Knight Bruce*, in reply:—Any alleged inconvenience that may result from the re-transfer of these trusts should have no weight, as all the new appointments were made after this appeal was known to be lodged. All the acts that have been done since, have been done in the face and defiance of this appeal;

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and the Appellants did all that was in their power to bring it to a hearing, while the Respondents did all they could to prevent the hearing. The House would not therefore be influenced by anything that happened in respect to other charities since this order was made. The reference made to the different form of the Irish Municipal Corporations Act, shows the strength of the Appellants' construction of this Act. The words in the Irish Act are not "until," but "unless Parliament shall sooner," &c. The mischiefs which this Act was to provide against were the political abuses, the self-elections of the governing bodies, and not any misgovernment of the charities. The chief object was to regulate the municipal government, not to remodel the charity trusts; that was a mere incident.

An argument was drawn from the number of the former corporation, that they being now in their natural capacity could not act together. But there are now 42 trustees appointed of these charities, 21 of one side, 21 of the other: are these 42 more likely to agree than the 85 members of the old corporate body? There is more facility for dissension in the present number, especially in respect to religion; persons of all religious persuasions being now in the corporation, which formerly consisted of one religious class.

Lord *Wynford* proposed this question for the opinion of the Judges, viz. "Whether the administration of the charity estates and funds comprised in, and described by, the 71st section of 5 & 6 *Will.* 4, c. 76, continued after the 1st day of *August* 1836 in the persons described in the said 71st section, no subsequent Act having passed respecting the same before the 1st of

August 1836, and no vacancy having been occasioned amongst such persons before that time?"

That question was agreed to by the House, and time was given to the Judges to answer it.

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Lord Chief Justice *Tindal* delivered the opinion of the Judges as follows :—In answer to the question proposed by your Lordships to Her Majesty's Judges [read it], I have the honour of stating our opinion to be, that the administration of the charity estates and funds referred to in the question, did not continue after the 1st of *August* 1836 in the persons described in the 71st section. It was admitted by the counsel for the Appellants in the course of the argument, and very properly admitted, that it is impossible to put any construction on the whole of the clause without meeting much difficulty. But we think ourselves bound to put that interpretation upon it, which, taking the whole of it together, appears to us to do the least violence to the words employed in it, and at the same time to give a consistent meaning to every part of the section. And keeping this object in view, we think the words in the 71st section, that the powers of the former trustees "shall continue until the 1st day of *August* 1836 or until Parliament shall otherwise order, and shall immediately thereupon utterly cease and determine," are to be construed as if the words had been "until the 1st of *August* 1836 or until Parliament shall in the meantime, or sooner, otherwise order;" and that the words "shall immediately thereupon utterly cease and determine," intend that if Parliament does not in the meantime otherwise order, the powers shall cease and determine on the

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1st of *August*; and if Parliament did in the meantime otherwise order, that then they should cease and determine upon the day which should be appointed and substituted by the Legislature instead of the 1st of *August*. And we feel ourselves warranted in giving this construction to the earlier part of the clause by the consideration that the last proviso in the same section contains an enactment relating to the same subject-matter of legislation, and which is free from all ambiguity whatever, viz. "Provided also, that if Parliament shall not otherwise direct on or before the 1st day of *August* 1836, the Lord Chancellor, &c. shall make such orders as he shall see fit for the administration of such trust estates." And we cannot understand the Legislature to have had in its view an alteration by Parliament unlimited in point of time in the former part, but limited in point of time to the 1st of *August* in the latter part of the same section. The construction contended for on the part of the Appellants, is further liable to this objection, that it leaves the time at which the powers of the former trustees are to cease and determine altogether undefined and uncertain. There might happen, according to that construction, an interval of time of unlimited extent before Parliament might think fit to interfere and otherwise order; and in the meantime it is obvious that all would be involved in doubt and uncertainty. And again, there is, as it appears to us, a very strong objection against the reading "and" instead of "or," as contended for on the part of the Appellants; that is, against reading the Act thus, "until the 1st day of *August* 1836, and until Parliament shall otherwise order:" for this would imply that Parliament could have no power to make such an order until after the 1st of *August* had passed; a construction not only

inconsistent with the general authority of Parliament, but irreconcilable with the proviso above referred to, which expressly refers to an alteration to be made before the 1st of *August*. Upon the whole, we think that the administration of the charity estates and funds did not continue in the persons described in the 71st section, after the 1st of *August* 1836.

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The *Lord Chancellor*:—This case, in which your Lordships' have just heard the opinion of the learned Judges, having been an appeal from an order made in Chancery ; and the opinion of the learned Judges being, that the administration of the charity estates did not continue in the persons described in the 71st section of the Act, after the 1st of *August* 1836: I shall move that your Lordships adopt the opinion so expressed ; and the only question will be as to the costs. This being an appeal against an order which, in the unanimous opinion of the learned Judges, is considered to be a correct order, and the Respondents being trustees of charities, I apprehend your Lordships will think it a case in which the order ought to be affirmed, with costs.

Lord *Wynford*:—I quite agree in the opinion delivered on behalf of the learned Judges: that opinion is the same which I had formed upon the question before I heard the opinion which has now been delivered. But I confess that, considering the difficulty in construing the Act of Parliament, and considering too that this is the first time that this question has come under the consideration of the House, and that it was important to the interests of the municipal charities in this country generally that the question should be determined,

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I think it would be hard to visit the Appellants with costs. In this case the learned Judges have found their way through all the mazes and perplexities of this Act of Parliament, in my opinion, to a right conclusion : but when it is admitted, even by the counsel, that the Act of Parliament was attended with difficulties, I think that the Appellants should not be visited with costs : and I would therefore move an amendment upon that part of the motion of my noble and learned friend, that the judgment be affirmed, without costs.

The *Lord Chancellor* :—I was not in the least aware that upon this point there would be any difference of opinion, otherwise I should have proposed that the further consideration of the case should be postponed, inasmuch as it is in the absence of a noble and learned Lord who has been present during the whole of the argument, and with whom I communicated upon this subject before he left the House : but as the noble and learned Lord who has just addressed your Lordships differs in his view of the judgment I proposed to your Lordships to pronounce, I would suggest that the consideration of the case be now postponed.

The *Attorney-general* :—May I be allowed to say that, on behalf of the Respondents, I am instructed to pray that their costs may be allowed? They submit that it would be extremely hard if the costs should fall upon the charity.

August 5.

The *Lord Chancellor* :—The only question remaining to be disposed of in this case is as to the costs.

The order appealed from is an order made in the Court of Chancery. The learned Judges have given their opinion unanimously that the judgment below is correct; and it is matter of course, unless there is some reason to the contrary, that costs should follow the affirmance of the judgment of the Court below, and particularly in this case where the Respondents are trustees of a charity.

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Lord *Brougham*:—There can be no doubt whatever upon it. I cannot say that a case might not have arisen in which a contrary practice might be adopted; but in this case there was no reasonable doubt raised upon the construction of the Act. The circumstance of the learned Judges being unanimous raises the presumption that the case was free from doubt.

Ordered, that the appeal be dismissed, and the order complained of be affirmed; and that the Appellants pay the Respondents the costs incurred in respect of the appeal.

Bailey v. Maule, referred to, *supra*, pp. 93–95, was an appeal against an order in the cause of *Watkins v. Maule* (2 Jac. & W. 237; see also *Maule v. The Duke of Beaufort*, 1 Russ. 349), which was a creditors' suit for the administration of the estate of *Benj. Hall*, esq. deceased. Under the decree in that cause, *Joseph Bailey*, esq. was reported the purchaser of the *Rumney* estate and iron works: the report was confirmed by an order dated August 16th, 1824, and the purchase-money paid into Court, and Mr. *Bailey* put into possession. Afterwards, by an order dated the 23d of February 1825, the former order confirming *Bailey* as the purchaser, and all the subsequent proceedings, were set aside, on the ground of some dealings between *Bailey* and *Llewellyn*, one of the trustees and executors of *Hall*. Mr. *Bailey*, though no party to the cause, appealed from that order. The appeal was heard and dismissed, and the order complained of was affirmed.—[Printed Cases in *Lincoln's Inn Library* for 1825, and 57 *Lords' Journ.* (for 1825) p. 737].

Appellate Jurisdiction.
An order of the Court of Chancery, setting aside a purchase made under a decree in a cause, maybe brought under review of the House of Lords by the purchaser, although not a party to the cause.

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July 29, 30.
August 5.

CHARLES TENNANT and Others - - *Appellants.*

JAMES HAMILTON - - - - - *Respondent.*

Evidence.
Cross-examina-
tion.
Competency of
Question.

ON the trial of an issue “ whether (during a certain period) there arose from the works of the defenders certain noisome, offensive, noxious or unwholesome smoke and other vapours, to the nuisance of the pursuer, whereby the produce of his garden was deteriorated,” evidence was adduced for the pursuer to show that the smoke and other vapours from defenders’ works had injured the produce of other grounds in the neighbourhood ; and also for the defenders to show that their works did not injure the produce of any other grounds ; and one of the defenders’ witnesses having, on his examination in chief, described several gardens in the neighbourhood of the works as in utmost health, was asked in cross-examination by pursuer’s counsel, if he knew *Glasgow-field* (grounds in the neighbourhood); and having answered that he “ knew *Glasgow-field*, and never knew of any damage done there,” he was then asked “ whether he had known of any sum having been paid by the defenders to the proprietors of *Glasgow-field* for alleged damage there occasioned by their works ? ” —

HELD by the House of Lords (overruling the judgment of the Court of Session) that the question was incompetent, as leading to a new collateral inquiry, which, answered either way, could not affect the issue, or test the credit of the witness.

THE question in this appeal originated in an action for damages brought by the Respondent against the Appellants in the Court of Session in *Scotland*, in the year 1834. The Appellants were then, and for several years before, partners in the manufacture of bleaching articles at the *St. Rollox* chemical works, near *Glasgow*. The Respondent had been tenant of a garden and nursery ground to the eastward of the said works, under a tack for 19 years from the year 1815, but had been ejected for non-payment of rent before that time expired. The action was brought for compensation in damages for the injury done to the Respondent’s garden, trees, plants, and vegetables, during his occupation, by the smoke and

other vapours emitted from the Appellants' works. Issues were prepared for trial by a jury. The first issue, which alone is material to be stated, was as follows: "whether during the year 1819, and subsequent thereto, up to Martinmas 1832, or during any part of the said period, there arose from the said works of the defenders (the Appellants) certain noisome, offensive, noxious, or unwholesome smoke and other vapours, to the nuisance of the said pursuer (the Respondent), whereby the produce of the said garden was deteriorated, and the pursuer incommoded and annoyed in the enjoyment thereof, to the loss, injury, and damage of the pursuer." The issues came on to be tried before Lord *Jeffrey*, in the Jury Court, held at *Glasgow*, in *October* 1836. "And in the course of the trial," (as stated in the bill of exceptions hereinafter mentioned), "the counsel for the pursuer did adduce evidence with a view to establish or satisfy the jury that the smoke and other vapours from the said works had occasioned damage and injury to the produce of other grounds in the neighbourhood of the said works; and the counsel for the defenders did adduce evidence to establish or satisfy the jury that the said works did not occasion any damage or injury to the produce of any other grounds in the neighbourhood thereof. And the counsel for the defenders examined—

"*David Smith*, who said he was land-surveyor in *Glasgow* for 30 years, and often surveyed lands about *St. Rollox*, and recently made a plan of the vicinage from his own survey. (Swears the plan is accurate, and explains it.) Knows *Harvey's* garden; nearer the works than pursuer's; is a most beautiful garden, and the finest flowers he ever saw. Was himself bred a gardener, and takes pleasure in it.

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Remembers pursuer occupying his garden ; it looked well in spring, but no attention was paid to keep it clean ; weeds grew over tops of bushes ; saw it when pursuer removed ; it was then wretched. Lately saw *Patrick's* garden, in the neighbourhood ; it had 20 fruit trees in it ; none had the least appearance of injury or disease except one branch of one pear tree ; shoots of currants from 21 to 39 inches, &c. Also examined *Edgar's* garden, which is most to west, and found all the same, good flowers, &c. Also surveyed *Broomhill* nursery, 200 to 500 yards from defenders' works ; everything there in utmost health at nearest places to the works ; plants of all ages in excellent condition. Surveyed all houses within circle of 700 yards of the works ; there are 748 dwelling-houses, from a rent of 120 *l.* to 5 *l.*

“ Cross-examined :— Rather less than eight acres occupied by defenders' works. They have increased greatly of late ; in 1824 covered nearly five acres, &c. Knows *Glasgow-field* ; never knew of any damage done there.”

The counsel for the pursuer having proposed to ask the witness “ whether he had known of any sum having been paid by the defenders to the proprietors of *Glasgow-field*, for alleged damage there occasioned by their works,” the counsel for the defenders objected to that question being put, and insisted that it was incompetent. The counsel for the pursuer insisted that on the whole circumstances of the case the question was competent ; but the objection was sustained by Lord *Jeffrey*, and he refused to allow the question to be put ; whereupon the counsel for the pursuer excepted to his Lordship's opinion, and tendered a bill of exceptions accordingly. After further evidence, the jury found a verdict for the defenders.

Lord *Jeffrey* afterwards signed the bill of exceptions, which being presented to the First Division of the Court of Session, their Lordships appointed the question involved in it to be argued on minutes of debate; and afterwards, upon advising the case with the minutes of debate for the parties, their Lordships pronounced an interlocutor on the 14th of *February* 1839, by which they allowed the exception, set aside the verdict, and granted a new trial (*a*).

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The appeal was against that interlocutor.

(*a*) 1 Dunl. B & M. 502.—The following are extracts from notes of the opinions of the Judges, contained in an Appendix to the Respondent's printed case, and certified by counsel to be correct.

Lord *Gillies* :—This case has been very ably argued in the papers which are now before us, and we are thus enabled satisfactorily to determine whether this question should have been allowed or disallowed by the presiding Judge at the trial. I must own that from the very beginning this case has always appeared to me in the same light, and I have never seen any cause to alter my original opinion : I must, however, say that I most heartily concurred in the opinion of the importance of this question, and as being one which well deserved from us the fullest and most ample consideration. I am extremely happy that the case has been put into that shape that we can now dispose of the point, which is very satisfactory both to ourselves and to the parties. I am also happy to say that I understand we are all agreed in opinion, and to add that that most learned and excellent Judge, of whose able assistance we are at present unfortunately deprived by indisposition (but who was present at the debate on this question), concurs in the opinion which I am now about to state :—[His Lordship, after stating the nature of the action and the terms of the first issue, and the material statements contained in the bill of exceptions down to the examination of the witness *Smith*, proceeded thus :]—The object of the defenders was, by his (*Smith's*) testimony, to show that in other gardens and grounds, situated nearer to the defenders' works than the garden of the pursuer, no injury was sustained by the plants, vegetables, &c. thereof. I need not go over his evidence in detail, but, in short, he goes over all the gardens in the neighbourhood, and states that, so far as he knew, no injury whatever was sustained by them from the works of the defenders. Now it is important to observe, that no objection was taken to this course of inquiry : it is said, indeed, that this was not the best evidence that could be adduced ; and most certainly it was not, for the parties themselves, whose gardens were said to have suffered, might have been called and examined ; so that this is secondary evidence

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The *Lord Advocate* and Mr. *Anderson*, for the Appellants :—The question which the Respondent's

(if I may so term it), and might perhaps have been, objected to ; but so it is that it was not objected to ; and all these matters are allowed to be gone into without objection. Then, after being examined by the defenders, he is cross-examined by the pursuer, when he says, " he knows *Glasgow-field* ; never knew of any damage done there." It was then proposed to ask him, " whether he had known of any sum having been paid by the defenders to the proprietors of *Glasgow-field*, the situation of which is pointed out on his plan, for alleged damage there occasioned by their works ?" This question was objected to as incompetent, and the question now is, whether that interrogatory should or should not have been allowed : and certainly, when we consider the general principles of jury trial, and particularly the examination of witnesses, this is a question of very great importance. If it was of importance to ascertain if the works of the defenders did or did not do injury to the adjacent territory, and if it was competent for the defenders to examine *Smith* for that purpose ; then certainly, after he had stated that, so far as he knew, no injury had been sustained by the grounds in the neighbourhood, it seems to me to have been highly proper on the part of the pursuer to ask him regarding the damage done to *Glasgow-field* ; and he deponed that " he knows *Glasgow-field*, and never knew of any damage done there : " and following up the same line of inquiry, the next question put, and that objected to, is, " do you know of any sum having been paid by the defenders to the proprietors of *Glasgow-field*, for alleged damage occasioned by their works ?" Now, it appears to me that this question is pertinent to the merits of the case, and I cannot conceive a more proper question for the pursuer to put ; but it was objected to, and on what grounds ? viz. that it might elicit an inadmissible or improper answer ; as, for example, that he had heard, or guessed, or suspected that such had been the case : but this is not an objection to the competency of the question at all. If indeed a question naturally or necessarily elicits an improper or inadmissible answer, then it may be objected to by the counsel, or by the Court, and it may even be so modified as to prevent such an answer being given to it ; but the question put in this case does not appear to me to be of that description : the question is, whether the witness *knew* that such a sum of money had been given by the defenders, not whether he had *heard* of or suspected it : for he may actually have paid, or seen paid, or been chosen for the purpose of paying this very sum of money : but it is absurd to hold the question incompetent because an improper or inadmissible answer *may* have been returned to it ; and we know that every day in the Justiciary Court a proper and pertinent question is allowed to be put, although the answer to it may not be received. But the real and only point to be ascertained in judging of the competency of such a question is, whether it necessarily or naturally is calculated to elicit such an answer : but when limited, as in this case, to the knowledge of the witness, how can it be calculated neces-

counsel proposed to put to the witness, and which was disallowed, was manifestly incompetent; it did not

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sarily or naturally to produce such an answer? for the witness is bound to speak only of his own knowledge, and to speak of nothing else. It seems to me, therefore, quite proper to put this question: but if there be any objection to the answer,—for truly this seems, on the part of the defenders, to be an objection to the answer,—it would be competent for the defenders, through the aid of their counsel, or for the Judge, to object to the answer, if the witness had stated what he suspected merely, not what he knew. The witness may have been present when the defenders offered compensation to the proprietors of *Glasgow-field*; he may have heard the amount of that compensation stated; he may have been employed to adjust and actually have adjusted the matter himself, well knowing that it was offered and accepted of as compensation: but all that goes to the answer which he is bound to make to the question, and though he said that he did not know of any damage being done there, he might still have known of money having been paid by the defenders for alleged damage. Put the case that *A.* is assaulted by *B.*, and that he brings an action of damages against him, and calls a witness *C.* who swears that he saw *B.* assault *A.*, would it not be competent for *B.*, on cross-examination, to ask *C.* whether he first of all saw *A.* assault *B.*, and knew that *A.* had actually paid a sum of money to *B.* for alleged damage then done to him? That would be a competent and relevant question. I therefore have no doubt, in the first place, that this was a competent question in itself: and in the second place, I do not consider that because an improper or inadmissible answer may have been returned to it, that was any reason for disallowing it: if such answer was given, it might have been objected to; as, if he was merely speaking from what he heard or suspected, and not of what he knew. In no case can you always get proper evidence, without the possibility at least of raising many answers which are quite inadmissible. I therefore think this question should have been allowed to be put, and that we should sustain the bill of exceptions. As to the plea, that perhaps money might have been paid by the defenders merely for the purpose of buying their peace, I am not quite sure that such a fact was wholly inadmissible, in a question where a third party was desirous of founding on it. But it is not required of me to give an opinion on that point, as it could not be raised until after the question had been allowed and answered.

Lord Mackenzie:—I concur in the opinion which has just been delivered, and think that, in the circumstances of this case, the question was competent, and ought not to have been rejected.

Lord President:—I am of the same opinion. This is a very important question, and it is fortunate we all concur in opinion. I must confess I had formed more than one opinion on it, but at last I have come to the same opinion with your Lordships. The witness is asked, “do you know whether a sum of money was paid by the

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bear on any fact arising in the cause under the issues, but merely went to inquire whether the Appellants paid money in order to get rid of an alleged claim: a matter quite irrelevant to the point in issue, and evidence in regard to which was inadmissible, because an answer even in the affirmative would be no proof of the fact proposed to be established. The payment of money, if proved, would not be proof that damage was done; it might be paid to buy peace, and get rid of an alleged claim. But it was argued in the Court below, that the proposed question, though incompetent as evidence in the cause, was admissible to test the credit of the witness. The answer is, that that was not the object for which the question was put, and the Respondent cannot now be allowed to rest on

defenders for alleged damage to *Glasgow-field*?" It is the question of knowledge that is referred to him, and he had previously answered that he never knew of any damage being done there; he uses here the word *knew*; he never *knew* of any damage being done. Now, the word "knew," as used there, may be capable of two or three meanings. I may never have known it myself, or I may never have seen it myself; but it did not follow that there was no damage done. But though it may be very true that he never *knew* personally of any damage being done, yet the question, "did you not know that money was paid by the defenders, for alleged damage?" might in the first place have refreshed his memory, and he might have said, "Oh, I forgot: I do remember now that a sum of money was paid by the defenders:" at all events the question was competent, whatever becomes of the answer of the party. The examination of the witness at this time related to the damage done to the neighbouring grounds; and in order to expiscate that matter, questions were allowed to be put in relation to particular grounds; and the question objected to was, "did you know that a sum was paid by the defenders for alleged damage?" and he might have answered, "I did; I was present at the whole transaction." Now, though this may have proved a compromise of the claim of damages at the instance of the proprietors of *Glasgow-field*, and though the answer might have been nugatory, or even hurtful to the party who put it, still that does not render the question in itself incompetent. I need not go over the various grounds which have been stated by your Lordships, in which I concur.

[His Lordship intimated that there was no doubt that Lord *Corehouse* was of the same opinion.]

a point that was not suggested at the trial, on which no judgment was asked or given at the trial, and which is not raised in the bill of exceptions. Besides, even if the question had been put for the purpose of testing the credit of the witness, still it would have been incompetent, because the answer to it in either way could not have tried the credit of the witness. They cited, in addition to several *Scotch* cases, *Phillips* on Evidence (a); *Starkie* on Evidence (b); and *Crowley v. Page* (c).

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The *Attorney-general* and Mr. *M'Neil*, for the Respondent:—The line of examination pursued by both parties at the trial had been to show, on the one side, that damage had been done to other grounds in the neighbourhood of the Appellants' works; and, on the other side, that no such damage had been done. The issue being to ascertain whether the smoke and other vapours from the Appellants' works were noxious or unwholesome, it was competent and quite relevant to inquire into the effects they produced on the neighbouring grounds. The statements contained in the record and bill of exceptions show that such injury to the neighbouring grounds had been specifically condescended on and examined into on both sides; so that there could be no objection to that line of examination on the ground of surprise at the trial. Although some of those statements were denied on the record by the Appellants, they were not stated to be irrelevant; and no motion having been made to have them struck out of the record, they had competently been admitted to be proved. The proposed line of

(a) P. 909 (ed. 1838).

(b) Vol. 1, p. 182, 183; vol. 2, p. 21, 22.

(c) 7 Car. & P. 791.

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cross-examination had also an immediate bearing on the question at issue. If it had been competently proved that injury had been or not been done to other grounds, it became then proper and necessary to ascertain the witness's means of knowledge of that fact. The latter inquiry was so necessarily consequent on the former, that the witness might himself have mentioned the fact of payment of money as his cause of knowledge of the damage, if he had been called to testify on behalf of the Respondent, and not against him. Would not payment of money for damage under a verdict of a jury, or under an award, have been admissible as evidence of damage having been done? It was a mistake of the Appellants to assume that the Respondent was attempting to make a payment, made in order to compromise a disputed claim or purchase peace, as they said, evidence of damage. That was premature; the proper time to consider whether a compromise of a claim of damages with the proprietors of *Glasgow-field* could affect the merits of the case, would be when such compromise was established. The Respondent's counsel had inquired merely into the witness's knowledge of the fact of payment, and no question was raised as to whether a compromise between the Appellants and a third party might be given in evidence. The Appellants alleged that no party complained of the nuisance; the Respondent alleged that there were such complaints, and that sums of money were paid for damage; to which the Appellants replied that these sums, even if paid, might have been paid under a compromise, which would not be proof of the truth of such complaints. But the question put and objected to was not "Do you know that there was a compromise?" but "Do you know that money was paid for alleged damage?" The fact

of payment of money though being collateral, yet being also relevant to the fact of damage having been done, which was the matter in issue, there was nothing to prevent the Respondent's counsel from cross-examining the witness in relation to it. Even in examinations in chief collateral but relevant matter may be inquired into, but much more so in cross-examination, and especially where the points to which the evidence was collateral formed the substance of the witness's previous examination. In cross-examinations with a view to sift evidence and try the credit of witnesses, great latitude is allowed in the mode of putting questions. *Starkie* on Evidence (*d*); *Phillips* on Evidence (*e*); *Parkin v. Moon* (*f*); *Harris v. Tippet* (*g*); *Ex parte Bardwell*, *In re Venables* (*h*); *Pearson v. Walker* (*i*).

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The *Lord Chancellor* :—The object of the action in this case was to try a question of nuisance to a garden in the neighbourhood of a manufactory, which, it was said, emitted vapour and smoke prejudicial to the property of the pursuer. A witness, *David Smith*, was called for the defenders, and he was examined as to certain premises in the neighbourhood of the manufactory; but he was not examined by the party producing him with respect to the place called *Glasgowfield*—not the place in question in the action, but a place situated near the manufactory. Both parties went into evidence for the purpose of showing what was the effect of this manufactory emitting smoke and vapour upon the lands similarly circumstanced

August 5.

(*d*) Vol. 1, pp. 25. 62.

(*e*) Vol. 1, p. 272.

(*f*) 7 Car. & P. 408.

(*g*) 2 Camp. 637.

(*h*) 1 Mont. & Ayr. 206.

(*i*) 13 Shaw & Dunl. 1138.

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to those of the party complaining. Whether that was a legitimate mode of inquiry need not now be considered; for both parties pursued it, and for one purpose it was undoubtedly a legitimate mode of inquiry, viz. for ascertaining what the effect was of the smoke and vapour emitted by this manufactory. This witness was examined as to several lands in the neighbourhood; and then a cross-examination took place, and the witness says in answer, "he knows *Glasgow-field*; never knew of any damage done there." That was not the answer which the pursuer, cross-examining the defenders' witness, wished him to give. He had fixed him with the knowledge of *Glasgow-field*; he intended to use him to show that *Glasgow-field* had been injured by the vapour and smoke emitted from the manufactory; but, however, the answer given was not for the benefit of the party cross-examining him. Then the counsel for the pursuer proposed to ask the witness "whether he had known of any sum having been paid by the defenders to the proprietors of *Glasgow-field*, for alleged damage there occasioned by the works?" The witness had already said that he knew of no damage done there. If that question had been asked him by the defenders, no doubt a great latitude in cross-examination might have been permitted to the pursuer, for the purpose as well of ascertaining what he meant by "he did not know," as for the purpose of testing the accuracy of his statement; but it so happens, when he says he knows *Glasgow-field*, and never knew of any damage done there, it is an answer given by him to a question of the pursuer in cross-examining him. The pursuer is entering into a line of examination for the first time, and having got an answer which did not suit his purpose, he endeavours to get rid of the effect of that answer by

putting a question upon a point short of what was the witness's knowledge; viz. "whether he had known of any sum having been paid by the defenders to the proprietors of *Glasgow-field*, for alleged damage?"

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The pursuer meant, if he could get an answer favourable to his view, to make that part of his case; he meant, not being able to get the witness to say that he knew of any damage, to get him to say that which he conceived would be the next best evidence, but which, in fact, would be no evidence at all. If the witness had answered in the affirmative, that he had known of money being paid for alleged damage, it would be no evidence; because money paid upon a complaint made, paid merely to purchase peace, is no proof that the demand is well founded; it is not, therefore, to be given in evidence in support of the fact of damage being sustained.

Upon general principles, the rule of law in this country and in *Scotland* must be the same: if a pursuer calls a witness, and asks him as to money being paid for alleged damage, his answer in the affirmative is not evidence of actual damage. If the pursuer had made a claim upon the owners of the manufactory for damage done to his field from the smoke and vapour emitted, and the owners had given money to quiet his complaint, that would be no evidence of the damage; it is money paid to buy peace and to stop complaint; it is very often a wise thing, however unfounded a complaint may be, for parties to pay a sum of money in order to quiet the party making the complaint. But this does not rest merely upon general principles. The rule of law in this country has been cited by the Appellants; and from the authorities cited by them, it appears there is no distinction between the two countries in this respect.

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The question clearly could not be put in elicited evidence for the party making the contention, but it is said it was admissible in order to credit of the witness. Now the witness had said nothing in his examination by the party for whom he was called, touching this matter. He had spoken of other properties, but he had said nothing which would lead to this cross examination, and therefore it was not for the purpose of testing the accuracy or truth of anything he had said. The question cannot be supported upon that ground, nor was that the ground which I understood the argument, upon which it was attempted to be supported, but that it might be a matter of inquiry, with a view to test the credit of the witness. But if it be not evidence, it is an inquiry perfectly collateral; an inquiry into a matter which was not relevant to the subject-matter in dispute, and does not relate to the subject-matter; and it is an acknowledged law of evidence that you cannot go into an irrelevant inquiry for the purpose of a collateral issue to discredit a witness produced by the other side.

On these grounds the learned Judge who tried the cause was of opinion that the question was not admissible under the circumstances of this examination. In opposition to that ruling of the learned Judge,—unfortunately to all parties, because leading to great and unnecessary expense,—a bill of exceptions was tendered, and the Court of Session was of opinion that the question was admissible. The party against whom the question was made necessarily came here in order that judgment might be considered; because the Court of Session, being of opinion that the ruling of the learned Judge before whom the issue had been tried was erroneous, and that the bill of exceptions was well founded.

had no alternative but to direct a *venire de novo*. It was necessary that the case should be tried again in consequence of the Court of Session coming to that opinion, however unimportant the point might be; so that there was to be a fresh inquiry upon a point which could not affect the question one way or the other, whether the jury had or had not come to a right conclusion upon the evidence produced before them; but assuming that they had,—(if they had not there would be ground for a motion for a new trial, and in that way, if there had been a failure in the jury trial, the parties might have had an opportunity of trying the case over again;)—but assuming that the jury had come to a right conclusion upon the matter before them, there is to be a new trial upon a point of evidence which, in whatever way the witness answered, could not, in my opinion at least, affect the result.

It is very unfortunate when cases take that turn, and protracted litigation ensues upon points which have not the slightest bearing upon the result of the case. In this country much depends, in reference to tendering bills of exceptions, upon those who have the conduct of the cause; and though it is competent for counsel to tender bills of exceptions, it is, in practice, reserved only for cases of great importance, where the real question between the parties is conceived to turn upon the point, and where it requires the adjudication of the Court to set them right. It is a matter to be regretted that the rule which prevails so beneficially in this country, of reserving that course of proceeding only for cases that really deserve it, is not followed in *Scotland*. This case is an example of the evil which must flow from the too liberal use by the suitor of the

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right of tendering a bill of exceptions, and calling in question the ruling of a Court of Justice.

I have no doubt that this was a question which, under the circumstances, it was not competent for the pursuer to put, and that the learned Judge who tried the cause came to a right conclusion upon the evidence, and the bill of exceptions upon that point ought to be disallowed. Under these circumstances I move your Lordships to reverse the interlocutor appealed from, which decided that the learned Judge who tried the issue had not properly ruled.

It was accordingly ordered that the interlocutor complained of in the appeal be reversed, and that the cause be remitted to the Court of Session, with directions to disallow the bill of exceptions, to determine all questions of expenses between the parties in the said Court, and to proceed otherwise in the said cause as shall be just, &c.

EDMUND PLOWDEN, Esq., THOMAS MAT-
TINGLEY, WILLIAM BUDD, GEORGE } *Appellants.*
BLISS, and CHARLES COWPER - - }

1840 :
January 27.
February 3. 6.

The Rev. HENRY THORPE, Clerk - - *Respondent.*

To a rector's bill against the owner and occupiers of lands for an account of tithes, they by their answers set up an agreement made in 1711, between the then rector and the owner of the lands (who was also patron of the living), by which certain lands and a perpetual annuity were given to the rector in exchange for his glebe lands, and for the discharge of the lands occupied by the defendants from tithes. The agreement was, and continued to be, beneficial to the church, having been made with reference to the probable future increase in the value of the tithes ; it was approved by the Ordinary and established by a decree of the Court of Chancery, and acted on down to the filing of the bill, when the rector refused to accept the annuity, but still retained the lands allotted to him in the exchange, which were much more valuable than the old glebe lands.—

*Tithes
Composition.
Principles of
Equity.
Construction
of Statutes.*

HELD, that although it was open to the rector to put an end to the agreement, as being void under the disabling statutes, he was not entitled to the aid of equity to enforce his legal title to the tithes while he retained part of the consideration for their discharge, contrary to the principle that he who seeks equity must do equity.

To a bill filed for tithes against occupiers of lands in *July* 1833, the owner was made a defendant by amendment in *January* 1835 :—*Quære* whether he was defendant to a suit commenced within the time limited by the Act 2 & 3 W. 4, c. 100, s. 3 ; that is, within a year from the 17th of *August* 1832 ?

THE Respondent was instituted and inducted into the rectory and parish church of *Aston-le-Walls*, in the county of *Northampton*, in *December* 1831 ; and on the 16th of *July* 1833, he filed his bill in the Court of Exchequer against the Appellants *Mattingley, Budd, Bliss, and Cowper*, for an account and payment of the single value of all tithes arising from the farms and lands occupied by them respectively within the said parish, from the time of his induction. The

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bill charged that the Respondent caused notice in writing of his demand of tithes to be served on the said Appellants in *June* 1833, but that they refused to comply therewith, on pretence of a subsisting *modus* or customary payment in lieu of tithes.

The four last-named Appellants by their answer set forth, among other matters of defence, an agreement dated the 1st of *March* 1711, and made by and between *William Plowden*, esq. (ancestor of the first-named Appellant) and the Rev. *John Wilson*, the then incumbent of the said parish, by which agreement,—after reciting that the said *W. Plowden* was lord of the manor of *Aston* and patron of the said church of *Aston-le-Walls*, as appendant to the manor, and was also seised of divers parcels of land lying dispersed in the common fields of *Aston*; and that the said *J. Wilson* was then rector of the said church, and in right thereof was seised of divers other parcels of land lying also dispersed in the said common fields, and also of a parcel of ground lying in a close called *Aston Close*, in the said parish, being the glebe lands belonging to the said rectory, and that in right of his said church he was entitled to tithes of all sorts arising as well out of the common fields as out of the demesne lands of the said *W. Plowden* in *Aston*; and further reciting that the said lands in the common fields were of little value, lying so dispersed, and that it was apprehended that it would be a great improvement as well to the said church as to *W. Plowden's* estate in *Aston*, if the said common fields were inclosed and certain exchanges made, but that *W. Plowden* was desirous that the rights and profits of the said church might be preserved, and that the said *J. Wilson* and his successors might have and enjoy, in right of his said church, an advantage by a just proportion of the improvement expected from such

inclosure,—it was agreed that all the several pieces and parcels of the common fields of *Aston*, therein respectively described, should, together with the churchyard, parsonage house and close, gardens, orchards, &c., and all grounds belonging thereto, for ever thereafter be deemed and taken as the glebe land of and belonging to the church of *Aston*, and as such should be for ever enjoyed by the said *J. Wilson* and his successors, rectors of the said church; and also that the sum of 40*l.* *per annum*, payable half-yearly, should be issuing out of and chargeable on the said *W. Plowden's* said manor, messuages and lands in *Aston*, and be secured for ever for the use and benefit of the said *J. Wilson* and his successors, rectors of the said church. (Then followed various easements, privileges, and benefits to the rectors.) And the said *J. Wilson*, by the said articles, in consideration of the premises, agreed to and with the said *W. Plowden*, his heirs and assigns, that all those pieces and parcels of land formerly reputed and taken as the glebe land belonging to the church of *Aston*, and lying in the said common fields, and theretofore in the possession of *J. Wilson* or his tenants, and the said parcel of ground in *Aston Close*, should from thenceforth be enjoyed by the said *W. Plowden* and his heirs as his and their own proper estate for ever: and also that all lands, tenements and hereditaments whereof the said *W. Plowden* was possessed as owner in *Aston* should for ever thereafter be discharged from the payment of all manner of tithes, oblations, &c., and all other dues theretofore payable out of his estate in *Aston*, except as aforesaid, and also except such tithes and dues as were properly personal, and did not purely arise out of *W. Plowden's* estate.

The answer then stated that shortly after the signing

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of the agreement, *W. Plowden*, with the approbation of *J. Wilson*, inclosed the whole of the said common fields of the manor of *Aston*, and duly set out the several parcels of land in the agreement mentioned to be given to *J. Wilson* and his successors, rectors of the church of *Aston*; and that *J. Wilson* entered upon, and he and his successors, incumbents of the said rectory, had ever since been, and that the Respondent as the present incumbent, was then, in the possession and enjoyment of the last-mentioned pieces of land; and that the said *W. Plowden*, pursuant to the agreement, also annexed to his estate the several pieces of land mentioned in the agreement as thereby agreed to be given to him in exchange; and *W. Plowden* and his heirs and assigns had ever since been, and then were scised and possessed of such last-mentioned lands.

The said answer further stated, that in *March 1713* *W. Plowden* and *J. Wilson* petitioned the Bishop of *Peterborough* (within which diocese the parish and manor of *Aston* lay) for leave to perfect the said agreement; and that the said bishop accordingly appointed commissioners to inquire into the subject-matter of the said agreement, and to report whether the covenants therein contained were reasonable and equal, and no ways detrimental to the church of *Aston* and the rectors thereof; and the said commissioners examined competent witnesses touching the subject, and it appeared by their testimony that the proposed exchange would be an advantage to the said rectory; that the tithes of the open fields were worth about 38*l. per annum*, and that they and the glebe lands had been let for 80*l. per annum*, but a reduction of 4*l.* was made to the tenant, and the tithes in the inclosed lands were worth about 18*l.* or 20*l.*, making the whole value of the glebe and tithes in *Aston* 94*l.*

or 96*l. per annum*; and that the annual value of the lands proposed to be given by *W. Plowden* in exchange (containing 140 acres) was from 120*l.* to 130*l. per annum*; so that the rectory would gain from 60*l.* to 70*l. per annum* by the exchange; and the commissioners accordingly certified that the proposed exchange of lands, and the annual payment of 40*l.* out of *W. Plowden's* estate, would be greatly to the advantage of the rectory: that the said bishop therefore duly consented to the carrying into effect the said exchange.

The answer then stated, that in 1714 the said *W. Plowden* filed a bill in the Court of Chancery against the said *J. Wilson*, and also against the Bishop of *Peterborough*; and thereby, after stating the said agreement, &c., and that the said *W. Plowden* and *J. Wilson*, to show the justice of their design in the said exchange and inclosure, and that the rights of the said church were not prejudiced but meliorated thereby, had joined in a petition to the said bishop to inquire by commission into the nature of the said inclosure and exchange, and that the said bishop had duly certified the same to be for the benefit of the said church, so that the said *W. Plowden* did hope to enjoy the lands so exchanged; but although the said *W. Plowden* and *J. Wilson* were the only persons then interested, and were satisfied as to the equality of the exchange, and were desirous to have the said agreement and inclosure perfected, yet the same could not be of force against the successors of the said *J. Wilson* in the rectory unless established by decree of the Court, &c.; and the bill prayed that the said agreement, exchange and inclosure might be established by decree of the said Court: That the Bishop of *Peterborough* answered the said bill, and admitted, that on

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the petition of the said *W. Plowden* and *J. Wilson* to him, a commission was issued to inquire whether the said inclosure and exchange were for the benefit the said church, and it was thereupon found to be much for the interest of the church, and not only beneficial to the said *J. Wilson*, but also to his successors, rectors of said church, and therefore that he (the bishop) was willing the same should be confirmed by decree of the Court: That the said *J. Wilson* also answered the said bill, and stated that he and the said *W. Plowden* had taken all precautions that the said exchange and inclosure might be reasonable and just, and that he was ready to ratify the same, and desirous also that the same should be established by the decree of the Court: That the said cause was heard in *July* 1715 before the then Master of the Rolls, who ordered and decreed that the said agreement should be performed, and that the said exchange of lands should be confirmed and made perpetual.

And the said four Appellants, by their said answer, further stated, that shortly afterwards the said *W. Plowden* sold the advowson of the said rectory to the president and scholars of *St. John's College, Oxford*, who purchased the same with full knowledge of the said agreement, and had ever since been the patrons of the said church, and had never questioned or impugned the agreement: That since the time when the said agreement was established by the decree of the Court of Chancery, the whole of the manor of *Aston* (except the said several pieces of land which by the said agreement were given to the rectory) had been tithe-free, and no payment of any tithe had ever been claimed by the rectors, but they had always held and enjoyed, and the Respondent as such rector did then hold and enjoy, the several pieces of land by

the said agreement annexed to the said rectory of *Aston*, and the several privileges secured to the rectors by the said agreement; and the said annuity of 40*l.* had always been duly paid by *W. Plowden* and his heirs to such rectors, and had been duly paid to and received by the Respondent as such rector since he became the incumbent of the said rectory up to *Michaelmas* 1832; and he had during his incumbency holden and enjoyed the said lands, and received and taken the said annual sum of 40*l.*, with full knowledge of the said agreement, and in lieu and satisfaction of all tithes of the said manor, and had thereby assented to the said agreement, and was bound thereby. The said Appellants admitted that they, previously to and since the year 1831, respectively held and occupied the several farms and lands situated within the manor and parish of *Aston*, and described in their answer, and that they had the several titheable matters therein stated, but for the reasons thereinbefore stated they had not set out or rendered the tithes, or made any satisfaction for them, inasmuch as the Respondent had regularly been paid the annuity of 40*l.* up to *Michaelmas* 1832,—since which time he had refused to receive it,—in lieu of all such tithes, according to the said agreement; and they said that the Respondent had never given them any notice of his demand, and never made any application to them to set out their tithes previously to the month of *June* then last. They said they believed that the said composition and exchange were very advantageous to the church of *Aston*, and were entered into with a due regard to the probable future increased value of the tithes of the manor, inasmuch as the value of such tithes at the date of the said agreement was much below the sum of 40*l. per annum.* They submitted

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that the said agreement was entire, and that the composition for tithes and the exchange thereby made was one contract and transaction, and that the said *W. Plowden* would not have given in exchange the lands which were so given by him to the rectors of the said parish, but for such contract and engagement to accept the said annuity in perpetual satisfaction of the said tithes; and therefore, in case the Court should be of opinion that the composition was no longer subsisting, then the said Appellants, by their answer, submitted that the exchange of the glebe lands of the parish of *Aston* for other parts of the common fields of the said parish comprised in the said agreement was void, and that the Respondent as such rector ought to give up and reconvey the several pieces of lands then in his occupation and enjoyment, and which were so exchanged for the old glebe lands under the said agreement; and they also submitted that *Edmund Plowden* (the first-named Appellant), who was then the lord of the manor of *Aston*, ought to be made a party to the suit.

The Respondent amended his bill under an order dated the 15th of *January* 1835, and made the said *Edmund Plowden* a defendant thereto.

Mr. *Plowden* put in a plea to that amended bill, and pleaded in bar thereto the said agreement, the confirmation of it by the bishop, and the decree establishing it (as before stated in the answer of the other Appellants), and also the Act of Parliament 2 & 3 *Will.* 4, c. 100 (a).

(a) An Act for shortening the time required in claims of *modus decimandi*, or exemption from or discharge of Tithes (passed the 9th of *August* 1832).—By the 1st section it is enacted, “that all prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter

The plea was argued on the 26th of *June* 1835, before the Lord Chief Baron, who, by his order of that

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demanded by our lord the King, his heirs or successors, or by any Duke of *Cornwall*, or by any lay person not being a corporation sole, or by any body corporate of many whether temporal or spiritual, be sustained and be deemed good and valid in law upon evidence showing in cases of claim of a *modus decimandi* the payment or render of such modus, and in cases of claim to exemption or discharge showing the enjoyment of the land without payment or render of tithes, money or other matter in lieu thereof for the full period of thirty years next before the time of such demand, unless, in the case of claim of a *modus decimandi*, the actual payment or render of tithes in kind or of money or other thing differing in amount, quality or quantity from the modus claimed, or in case of claim to exemption or discharge, the render or payment of tithes or of money or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of modus was made, or enjoyment had, by some consent or agreement expressly made or given for that purpose by deed or writing; and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible upon evidence showing such payment or render of modus made or enjoyment had as is hereinbefore mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: Provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such payment or render of modus made or enjoyment had (as the case may be) not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of modus was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing.

2d. And be it further enacted, that every composition for tithes

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date disallowed the plea; and by another order dated the 26th of *November* 1835, and made on a rehearing of the plea, confirmed his former judgment, and dismissed the petition of rehearing, without costs.

The Appellant, *Edmund Plowden*, then put in his answer to the bill, and therein set forth the agreement, the several proceedings taken for its confirmation, together with the decree of the Court of Chancery, and the said Act of Parliament, and other matters of defence, which had been stated in his plea; and he also stated, that since the making of the said agreement, and before the filing of the bill, there had been more than three rectors of the said parish, and more than sixty years had elapsed, and he submitted that on that ground also he was entitled to the benefit of the said Act, and he claimed to be allowed the benefit thereof, and he submitted that, if the Court should be of opinion that the said lands were not, under the circumstances, discharged of tithes, and that the Respondent was not bound by the said agreement, then, as the agreement was one entire agreement, it ought to be altogether avoided and set aside, and the lands and other privileges given to the rector in exchange as aforesaid, and which were

which hath been made or confirmed by the decree of any Court of Equity in England, in a suit to which the ordinary, patron and incumbent were parties, and which hath not since been set aside, abandoned or departed from, shall be, and the same is hereby confirmed and made valid in law; and that no modus, exemption or discharge shall be deemed to be within the provisions of this Act, unless such modus, exemption or discharge shall be proved to have existed and been acted upon at the time of or within one year next before the passing of this Act.

3d. Provided always, that this Act shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters before mentioned, now commenced, or which may be hereafter commenced, during the present session of Parliament or within one year from the end thereof.—(The session ended on the 17th of August 1832.)

then held and enjoyed by the Respondent, ought to be restored to this Appellant, who in that case would be entitled to all the estate and interest which the said *W. Plowden* had therein previously to the exchange; and he insisted that the Respondent could not have any decree for tithes against the other Appellants in respect of the lands occupied by them in the manor of *Aston*, until the Respondent should have restored to this Appellant the lands and other privileges which were then held and enjoyed by the Respondent, and had taken back the ancient glebe of the said rectory, which this Appellant was willing and submitted to give up in case the said agreement was avoided, upon having the said lands and other privileges then enjoyed by the Respondent restored to him.

From the evidence in behalf of the Appellants (which proved all the matters of defence set forth in the answers), it appeared that the Respondent was the fourth rector of the parish of *Aston* since the date of the agreement (1711); that the lands and privileges thereby annexed to the rectory, and the annuity of 40*l.*, had been held and received by them successively, without their making any claim of tithes, and were still held and received by the Respondent, except that in regard to the annuity he refused to receive payment of it since *Michaelmas* 1832, when he set up his claim to the tithes. And it also appeared that the lands and privileges so annexed to the rectory, and the said annuity, formerly exceeded the value of the old glebe lands and tithes given in exchange by 60*l.* or 70*l.* a year, and were at the present time more than equivalent to the tithes of all the Appellant's (*Plowden's*) lands in *Aston*, and to the lands given to his ancestor by the rector

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under the agreement. All this Appellant's lands in *Aston* contain about 740 acres, divided into four farms, occupied by the other Appellants.

A witness on behalf of the Respondent showed that all the occupiers of land in the parish, except the four Appellants, paid him compositions in lieu of tithes for the farms and lands in their respective occupations. And it appeared from a terrier dated *July* 1711, that the then glebe was a piece of about 87 acres, lying together in one part of the parish, and about 16 acres adjoining the parsonage house, and that the tithes were then all payable in kind: and from another terrier, dated 1720, it appeared that the lands then belonging to the rectory in consequence of the new arrangement exceeded 140 acres: 142 acres was the number which the witnesses for the Appellants deposed to.

The cause was heard on the 8th of *February* 1837, by Mr. Baron *Alderson*, who, on the 15th of *February*, pronounced his decree for an account against *Mattingley, Budd, Bliss, and Cowper*, with costs, dismissing the bill as against the Appellant *Plowden*, without costs (*b*).

The appeal was against that decree, and also against the orders overruling the plea. While the appeal was pending *Edmund Plowden* and *Charles Cowper* died; and by an order of the House, dated the 29th of *June* 1838, the appeal was revived in the names of their respective executors. By another order of the House, dated the 1st of *August* 1839, *William Henry Francis Plowden*, esq., who on the death of *Edmund Plowden* became seised as tenant in tail of the said hereditaments, was made a party Appellant by his own desire.

(*b*) See the case reported, 2 Younge & Collyer, 421, where the agreement of 1711 is more fully set out.

Mr. *Boteler* and Mr. *Bethell*, for the Appellants:—
 The agreement of the 1st of *March* 1711, being a composition for tithes confirmed by the decree of the Court of Chancery in *England*, in a suit to which the ordinary, patron and incumbent were parties, and not having been set aside, abandoned or departed from, at the time of the passing of the Act of the 2d & 3d *Will.* 4, c. 100, was, by the second section of that Act, confirmed and made valid in law. That Act was passed on the 9th of *August* 1832, and it was proved, indeed it was not denied, that the Respondent received the half-year's annuity of 40*l.* at *Michaelmas* 1832; and therefore the exemption from tithes claimed by the Appellants “existed and was acted upon at the time of, or within one year next before, the passing of that Act,” and must be deemed to be within its provisions. That Act, according to the true construction of its third section, was available for every person entitled to or claiming any benefit or protection under the same, unless a suit were commenced against such person within the session of Parliament during which the Act was passed, or within one year from the end of that session. The Act was therefore available to the late Appellant, *Edmund Plowden*, for supporting the composition and maintaining his plea, he not having been made a party to the Respondent's suit till after the period limited by the third section of the Act. The session in which the Act was passed ended on the 17th of *August* 1832. The original bill was filed in *July* 1833, which was in time as to the defendants to that bill. But Mr. *Plowden* was not made a defendant until the bill was amended in *January* 1835. Under these circumstances the orders overruling Mr. *Plowden's* plea were clearly erroneous.

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Then as to the decree, it is equally clear that no decree for an account of tithes could be made against the Appellants, the occupiers of Mr. *Plowden's* estate in *Aston*, so long as the composition and agreement are in force, and they cannot be set aside or impeached, except in a suit to which not only Mr. *Plowden*, the owner of the estate (it appears he was only tenant for life), but also the patron and ordinary of the church of *Aston*, are parties, whereas the Respondent did not think proper to make the patron and ordinary parties to his suit. At the hearing the Respondent dismissed the bill against Mr. *Plowden*, before entering upon his case against the Appellants, the occupiers, thereby leaving the composition and agreement in full force.

The Respondent claims the tithes while he retains the lands that were annexed to the rectory in consideration of the exemption of the rest of Mr. *Plowden's* estate in *Aston* from tithes. But the composition and agreement being one and entire cannot be rescinded and set aside in part; they must be rescinded and set aside entirely, or not at all; inasmuch as the composition was not a mere grant of the annuity of 40*l.* in lieu of the tithes of Mr. *Plowden's* estate, but a grant of the lands and other privileges and advantages given to the Rev. *John Wilson* and his successors by the agreement, together with the annuity, in lieu of the lands given up by Mr. *Wilson*, and the tithes of the rest of Mr. *Plowden's* estate; and inasmuch as the lands allotted to *Wilson* and his successors were alone, without the other privileges and advantages given to him and them, and without the annuity of 40*l.*, of much greater value than the lands given up by *Wilson* and the tithes of *Plowden's* remaining estate in *Aston*; and the lands and other privileges and advantages

given to *Wilson* and his successors by the agreement, must have increased in value since equally in proportion with the lands given up by him and the tithes of *Plowden's* estate, and are now, with the annuity, a full equivalent for the said lands given up by *Wilson* and the tithes of the estate; so that if the Respondent is suffered to recover the tithes of the estate, and at the same time to hold and enjoy the lands and other privileges and advantages allotted to the rectors by the agreement, he will be more than doubly satisfied for the tithes of the estate. Mr. Baron *Alderson* thought, when he pronounced this decree, that he was following the decision of Lord *Northington* in the *Attorney-general v. Cholmley* (c). That case is reported differently in several books, and it is not clear that it applies at all to this case. It appears from the record which the Appellants have procured, that Dr. *Blair*, the rector and plaintiff (for it was an information and bill), offered to open the whole agreement. And it appears from the report of Lord *Northington's* judgment, both in *Ambler* and *Eden*, from which latter the case is taken by *Gwillam*, that his Lordship observed particularly that the agreement did not provide for the prospective increase of the value of the tithes; and these two material circumstances distinguish that case from the present. And in that case the Crown, the patron of the living, was a party, but in this case the patron is not a party.

The Respondent having been at the time of filing his bill, and being at the present time, in the possession and enjoyment of the lands and other advantages given to *Wilson* and his successors by the agreement, is not in a situation to recover tithes of *Plowden's*

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(c) 2 *Eden*, 304; S. C. *Amb.* 510; 3 *Gwill.* 914; 2 *E. & Y.* 203 3 *Burn's Ec. Law*, 439; and 7 *Bro. P. C.* 34.

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estate, and therefore, and by reason of the Respondent not having offered, by his bill or otherwise, to rescind the agreement entirely, his bill ought to be dismissed with costs; or in case he is permitted to retain his decree for tithes, it ought to be upon condition of the agreement being rescinded entirely, and the Respondent giving up to Mr. *Plowden* the lands, and relinquishing the other privileges and advantages allotted to the rectors by the agreement, as well as giving up the annuity of 40*l.*, and taking back the lands given up by *Wilson* to *William Plowden*; and all proper orders and directions ought to be given by this House, or the Court of Exchequer, for ascertaining the lands to be given up by both parties, mutually and respectively, and for effectuating a complete re-exchange of the premises exchanged under the agreement, and restoring the parties respectively to the situations in which those under whom they claim were, previously to the inclosure of the common fields of *Aston*, and to the making of the agreement. There may now be much difficulty in ascertaining the parcels of land, but still, without restoring the two parties to the situations in which they would be if no composition had taken place, complete justice cannot be done.

The decree has given the Respondent the tithes of the land in question, as against the Appellants, *Mattingley*, *Budd*, *Bliss*, and *Cowper*, from the time of the presentation of the Respondent to the rectory of *Aston*, although it was clear that he had accepted the annuity of 40*l.* up to *Michaelmas* 1832, whereby, even upon the principle upon which the decree was founded, he was satisfied for so much of the tithes as had arisen up to the last-mentioned period. The decree having dismissed the bill as against Mr. *Plow-*

den, and having thereby admitted that the Act 2 & 3 *Will.* 4 confirmed the agreement *ab initio*, ought to be reversed, and the bill dismissed against all the Appellants.

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Mr. *Swanston* and Mr. *G. Richards*, for the Respondent:—The defendants to the original bill insisted, in their answer to it, that Mr. *Plowden*, the landlord of their farms, ought to be a party to the suit; and on their suggestion, the Respondent made him a party defendant to the suit, but no relief was prayed against him. The foundation of the decree against the occupiers of the land is, that the Respondent, being the parson of the parish, has a legal right to the tithes, and that the agreement under which exemption is claimed by them is a nullity under the Act 13th *Edw.* c. 10, s. 3. The recent Act, therefore, which was pleaded by Mr. *Plowden*, cannot confirm the agreement, because there was no valid agreement in existence at the time. The alleged agreement was null and void on the authority of the case of the *Attorney-general v. Cholmley*, in which this House, on appeal (*d*), affirmed the judgment of Lord *Northington*.

This House will not allow an equitable claim to be set up as a defence to a legal right, if the legal right is clearly made out. The equity set up by the Appellants is, that the Respondent's predecessors in the rectory took benefits from the agreement, which if the Respondent abandons, he ought to restore the equivalent which they say he holds. The short answer to that is, that it is no defence to this suit; the Appellants might have filed a bill against the Respondent to establish their equity.—[The *Lord*

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Chancellor: Up to 1833 the Respondent was in possession of all the benefits and privileges granted to and taken by his predecessors in lieu of tithes, by the agreement: nothing was due to him up to that period.]—The Respondent says the agreement was void: he received the stipend up to *Michaelmas* 1832, in ignorance of his rights; and although he continued in possession of the lands given to the church by the exchange, it was competent for him at the same time to claim his legal right. If it is possible to restore the Appellants to the position in which they would stand if no agreement had been entered into, let them be so restored by a bill in a Court of Equity; but if it is now impossible so to restore them, let not the fault be imputed to the Respondent, or his legal right be embarrassed by any alleged equity of the Appellants.

The frame of the suit in the *Attorney-general v. Cholmley*, was the most favourable to the Appellants: it went to rescind the agreement, and then for consequential damages. The frame of the bill in the present case is different, and the agreement cannot be set aside on it. In *Cartwright v. Colton* (e), the course adopted in this case was pursued. The case of the *Attorney-general v. Cholmley* has never been questioned, but referred to with approbation by Sir *Thomas Plumer* in the *Attorney-general v. Warren* (f), and by Lord *Eldon* in *O'Connor v. Cook* (g).

Supposing this agreement was not absolutely void before the passing of the Act 2 & 3 Will. 4, c. 100, the Respondent submits that it was not protected by that Act, inasmuch as the agreement was abandoned by the notice of demand of tithes, and the suit was instituted within the time limited by the 3d section,

(e) 4 Wood, 88.

(f) 2 Swans. 311.

(g) 8 Ves. 537.

which excluded the operation of the Act from suits commenced at the time of its passing, or within one year from the end of that session, that is, from the 17th of *August* 1832. The construction put on the 2d and 3d sections in a case at law is, that parties shall not be entitled to raise the question of the validity of a tithe composition when confirmed in the manner mentioned in the 2d section, unless they commence their action or suit within the time limited by the 3d section (*h*). The bill against the occupiers having been filed within the year, and the original and amended bill forming but one record and one suit, the whole suit was commenced within the year.—[The *Lord Chancellor*: Suppose Mr. *Plowden* was an occupier, or suppose that, in consequence of a composition, he was entitled to tithes himself, would the suit as against him (who in the supposed case would be a necessary party) be within the time limited by the third section?]—The suit against the occupiers having been commenced in time, the lands occupied by them are not exempt by force of the Act, and the Act, therefore, presents no obstacle to the Respondent's suit to obtain the benefit of his legal right, and the plea of that statute was properly overruled.

There are other objections to the appeal; more however in point of form than of merits. The bill having been dismissed by the decree at the hearing as against Mr. *Plowden*, and dismissed without costs, he ought not to be joined in the appeal against that decree; nor was it material for him to appeal against the order overruling his plea; nor does it make any difference to him whether these orders are affirmed or reversed, inasmuch as, after the dismissal of the bill against him, it was of no consequence to

(*h*) Per Lord *Abinger*, in *Thorpe v. Mattingley*, 5 M. & W. 302.

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him what became of the plea, having obtained by the decree the full benefit of his plea. The plea having been put in by Mr. *Plowden* alone, the order overruling it did not in any way affect the other Appellants; they ought not, therefore, to be joined in an appeal against any order disposing of the plea. The Respondent never desired to make Mr. *Plowden* a party to the suit, and nothing was thereby prayed against him. The other defendants, by their answer, alleging that he had an interest, insisted on his being made a party; and therefore the irregularity of joining him in the appeal against the decree cannot be justified by his being made a joint defendant. There was a precedent in the case of *Hughes v. Davies* (i), for making him a defendant. Under these circumstances the Court below, if appealed to, would not revive the cause against Mr. *Plowden's* executors, although the appeal has been revived in their name by order of this House.—[The *Lord Chancellor*: The decree leaves the Respondent in possession of the lands annexed to the rectory by the composition, while it decrees him an account and satisfaction of the tithes. Is not Mr. *Plowden* the owner of the lands affected by the decree?—The Respondent has always treated the composition as a nullity, as an invalid modus, and proceeded on his legal rights.—[The *Lord Chancellor*: However invalid it may be as a modus, the rector surely cannot, while he acts on it by retaining the equivalent for the tithes, claim the tithes also.]—As to future tithes, the agreement cannot avail; the account is to be taken only from the last payment of the composition: the decree leaves it to the Master to consider from what time the account is to be taken.

(i) 5 Sim. 331.

Mr. *Boteler*, in reply:—The Appellants (the occupiers) properly insisted that their landlord should be made a party; and not only the landlord, but the present patrons of the rectory (*St. John's College*), to whom *W. Plowden* sold the advowson, ought also to be parties to the suit. As the Respondent joined all the Appellants as defendants, why should they not be joined as Appellants, and thereby save the expense of two appeals, one by Mr. *Plowden* against the orders overruling the plea, and the other against the decree? The decree gives an account for tithes for a time during which the rector was receiving the equivalent. The rector was not entitled to any account until he first gave back the lands and other advantages received by the rector from the composition. It would be contrary to all principles of equity to allow him to hold the equivalent for the value of the tithes, and to give him an account of the tithes in kind at the same time. *Cartwright v. Colton* had no application to this case.

The *Lord Chancellor*: If the decree was conditional on restoring the benefits derived from the agreement of 1711, you would not object to pay the tithes?

Mr. *Boteler* and Mr. *Swanston* said they would agree to take a decree in the terms proposed by his Lordship, but they feared the difficulty of now identifying the lands given in the exchange in 1711 would be insuperable.

The *Lord Chancellor* said he would give them a few days to consider that matter, and he would in the mean time look into the case.

The *Lord Chancellor*:—I shall abstain, in the absence of the noble and learned Lord (Lord *Brougham*) who was present during the argument of this case,

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from asking your Lordships to come to any final decision upon it; but, the parties being in attendance, it may be as well that I should state the views which I take of the case, on a consideration of the arguments.

The question arose upon a decision of the Court of Exchequer, by which a decree was made, directing an account of tithes, generally, against certain persons who were occupiers of lands within the parish of *Aston-le-Walls*. Mr. *Plowden*, who was tenant for life and landlord of the lands in question, had been made a party to the suit; but he having pleaded, and his plea being overruled, he answered, and at the hearing the bill was dismissed against him. The decree, therefore, according to the proceedings as they stand, was an ordinary decree for tithes against the occupiers of the lands.

The Bill was filed on the 16th of *July* 1833, and to the Bill as originally filed there were no parties defendants except the occupiers of lands. On the 12th of *December* 1833, those occupiers put in their answer, and stated (what was afterwards proved, and which constitutes the question in the cause) that in the year 1711 an arrangement had been entered into between a Mr. *Plowden*, who was then the owner of the fee in these lands, with the then rector of the parish, by which certain lands, the property of Mr. *Plowden*, were conveyed for the benefit of the church, and certain glebe lands belonging to the church were assigned to Mr. *Plowden*, and other lands belonging to him in the parish were to be held for the future tithe-free. It appears that this arrangement was submitted to the bishop of the diocese, and that after an investigation as to the terms of that arrangement it was sanctioned by the bishop; and it appears also that it afterwards became the subject of a suit in the

Court of Chancery, to which the patron, ordinary, proprietor and rector were parties, and that the suit ended in a decree establishing the arrangement.

My Lords, it appears (and I now state what was proved on the investigation which took place before the commissioners appointed by the bishop) that the glebe lands taken by Mr. *Plowden* were of the value of 40 *l.* a year, and that the tithes were of the value 56 *l.* a year; that the lands given by Mr. *Plowden* to the church were of the value of 130 *l.* a-year, and that there was, in addition to those lands so given to the church, a rentcharge of 40 *l.* a year upon the other property belonging to Mr. *Plowden* in the parish. It appears that from that time down to the time when this bill was filed, or, at all events, until very shortly preceding the time when it was filed, all parties acted upon the faith of that agreement. It appears also that the present incumbent, the Respondent, was instituted to this living in the year 1831, and that he received the rentcharge of 40 *l.* a year, including the payment to *Michaelmas* 1832. It was proved by two witnesses that he had at all times remained in possession of the lands, and that at the time the depositions were taken he was in actual possession of those lands, which had by Mr. *Plowden* been devoted to the church, in exchange for the advantages he derived under the agreement in respect of his estate. Now, on looking to the agreement, which, it is very material, should be accurately examined and compared with the evidence before the commissioners appointed by the bishop, it appears that inasmuch as the value of the tithes released exceeded the 40 *l. per annum* rentcharge, and the value of the lands given by Mr. *Plowden* exceeded the value of the glebe lands taken, by a sum equal or very

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nearly equal to 90 *l.* a-year—if the 40 *l.* a year had been in lieu of the tithes it would have been an inadequate compensation for them, even according to their then existing value, the tithes being nearly 60 *l.* a year and the rent-charge only 40 *l.*—if the lands were to be changed for the glebe lands it would appear that that would not be the contract, inasmuch as the glebe lands were of the value of 76 *l.* a year, and the lands granted to the rector by Mr. *Plowden* were of the value of 130 *l.* a year. It is quite clear therefore that some part of the lands granted by Mr. *Plowden* to the rector, were in consideration of the discharge of his other lands from tithe. It is most important to keep that fact in view when your Lordships come to consider how far the authority which has been the guide of the Court below upon this subject can be considered as applicable to this case.

We find that the present rector, succeeding to the rectory, found this agreement in operation,—not binding, as contended and truly contended, because the statute (*k*) prevented parties, notwithstanding all the solemnities which had accompanied such a contract, from giving effect to a discharge from tithes by an agreement which had been thus entered into,—but it is perfectly certain that even if there had been an ordinary composition, the party succeeding to a rectory, acting on a composition made during the time of his predecessor, although he may have had the power to get rid of it, must be considered as so far becoming a party to that arrangement that he cannot, as a matter of course and at once, treat those with whom the contract was subsisting as if no such agreement had been made ; but at all events he cannot do this,—he cannot

(*k*) 13 Eliz. c. 10, s. 3.

claim a compensation for the discharge of tithes, and come into a Court of Equity to ask for payment of those tithes. Now it appears that the rector received the 40*l.* till *Michaelmas* 1832, and that he still holds the lands; that he gave no notice of any kind till *June* 1833, and that in the month of *July* following he filed his bill. In the case of *Hewitt v. Adams* (l), this House dismissed a bill for want of proper notice to determine a composition, although the defendants disputed the rector's right to end the composition, and that case Lord *Thurlow* considered as a binding authority in a case in which the defendants had set up a *modus*, which was the case of *Bishop v. Chichester* (m). In this case there is no question about determining a composition, which, though voidable against successors, may be adopted and become binding upon them till avoided, because the rector in this case is still in possession of the lands given in lieu of the tithes. It is said that the Master in taking the account has not gone beyond *Michaelmas* 1832, when the last payment of the rent-charge was received. But why is the receipt of the rent-charge to stop the account, if the possession of the lands is not to defeat the plaintiff's title to it? While the plaintiff retains the substitute for the tithes, he cannot claim the tithes; therefore there was nothing due when the bill was filed.

There is, however, a distinct ground of defence growing out of this state of things; the plaintiff holds the lands given in exchange for the tithes by the conveyance of 1711, and this decree gives to the plaintiff the tithes out of the lands agreed to be discharged, but leaves him in possession of the lands given to him

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(l) 7 Bro. P. Cas. 64.

(m) 2 Bro. C. C. 160.

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as the consideration of the discharge. Equity thus gives its assistance to work the great injustice of restoring to the plaintiff the thing sold, without requiring repayment of the consideration. This is contrary to one of the first principles of equity, "that he who seeks equity must do equity." It was said indeed that in suits for tithes a Court of Equity only gives effect to a legal title, and that this principle therefore does not apply to this case. It is quite immaterial what is the nature of the demand; it is the exercise of its jurisdiction which the Court withholds, unless the party seeking its exercise will do what the Court thinks just. I had occasion lately, in the case of *Sturgis v. Champneys* (n), in the Court of Chancery, to review the authorities upon this subject, and this was the principle upon which I acted. I think it impossible, therefore, to give to the plaintiff any assistance in equity, without seeing justice done to the other parties to the agreement of 1711. If that were possible in this suit, and if there were no other fatal objections to it, the question would be, what such justice required? The agreement was, to give up the land in fee, and discharge for ever Mr. *Plowden's* other lands from tithes. The late defendant, Mr. *Plowden*, was only tenant for life; but if the lands given to the rector are to be restored to Mr. *Plowden's* estate, and the ancient glebe taken out of that estate and restored to the rectory, it is obvious that the owner of the inheritance must be a party to that proceeding, but there was no such person before the Court at the hearing. Although the tenant in tail has, in what right does not very well appear, raised this appeal, we must, however, look at the

(n) MS., and see 4 Myl. & Craig.

case as it existed at the hearing; this could not be cured by adding him as a party, because the bill makes no case, and asks no relief for the purpose of raising any such equity.

It has been supposed, however, that there is authority to support this decree, however opposed it may be to those well-known principles of equity to which I have adverted; and that authority is the case of the *Attorney-general v. Cholmley*. From the report of that case in 2 *Eden*, 304, it appears that the owner of the land, as well as the patron and ordinary, were parties, and Lord *Northington* proceeded upon this, that by the agreement the land given to the rector was an exchange for the glebe, and the money payment was in lieu of the tithes; and that the contracts, though contained in one agreement, were distinct. That decree, therefore, did not, as this does, give the rector the tithes, and leave him in possession of what had been given to the rectory for the purchase of them. It is clear that if this had been so, and he had not had the power of restoring the parties to the situation in which they would have stood if no such agreement had been entered into, he would not have made the decree for the payment of the tithes. The observation he makes at the close of his judgment is well worthy of remark; he says, "If the parties had made an allowance for the *future improved* value of the tithes, they would have stood on a different footing, and I should not have been inclined to relieve: they then would have been purchasers for a valuable consideration, by allowing for the future improvements. The equity of this Court would have been suspended, by setting up equity against equity, and I should have left the rector to his remedy at

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law (o).” This does not appear to me to be inconsistent with the opinion he had before expressed, that the agreement was void; he only means that equity would have interfered, and he obviously alludes to the maxim used by the defendant’s counsel in that case, *ecclesia meliorari, non deteriorari, potest* (p), and which he had before answered, by stating that the agreement in question was unequal and injurious to the church, in not providing for the improved value of the tithes. In this case that is provided for; the land given to the church greatly exceeding the value of the glebe land and of the tithes given up by it. To rescind the agreement altogether, if practicable, would be highly injurious to the church; to decree payment of the tithes without doing so, would be most unjust to the other parties to it.

The view I have taken upon this part of the case makes it unnecessary to observe on the construction put on the 2d & 3d *Will.* 4, c. 100. Had it been necessary to decide that question, I should have found much difficulty in concurring in an opinion (q) that a defendant, against whom no proceedings were instituted until *January* 1835, could not claim the benefit of the third section, because the suit to which he was made a defendant by amendment had been commenced against others within the prescribed time.

These opinions I have formed on considering the printed papers and attending to the argument at the bar; and after I shall have communicated with the noble and learned Lord who was present during the discussion, I shall move the judgment of the House on this case. If that noble and learned Lord concurs in the opinions I have now expressed, the motion I

(o) 2 Eden, 318.

(p) *Id.* 313.

(q) 2 Y. & C. 238.

shall submit to the House will be to vary the decree by dismissing the bill, with costs.

The *Lord Chancellor*:—Since I hinted to your Lordships the opinion I had formed on this case, I have had an opportunity of communicating with the noble and learned Lord who also attended the hearing, and I have from him authority for stating that he entirely concurs in the opinions I expressed. The course which I propose to your Lordships to take will not entirely exhaust the case, inasmuch as the appeal embraces not only the final decree, but also the order made by the Court of Exchequer upon the plea put in by Mr. *Plowden*. But I apprehend, if your Lordships agree in the opinion which I have suggested, namely, that the bill should be dismissed, you will not be called upon to give any opinion upon that plea, inasmuch as the object of the party appellant will be obtained as to all the substantial parts of the case. The utmost possible question which can be involved in the plea is a question of costs of the smallest amount; for whatever opinion you might form on the plea, which involves considerable difficulty on the construction of the Act of Parliament, your Lordships will doubtless think, in differing from the opinion of the Court of Exchequer, that that plea, if allowed, ought to be allowed without costs.

Ordered and adjudged, that so much of the said decree as directs that it be referred to the Master to take an account of what was due to the Respondent from the Appellants (the occupiers) for the single value of tithes, &c., and to tax the Respondent's costs as against the said Appellants, be reversed; and that it be directed that the Respondent's bill be dismissed against the said Appellants, with costs; and that so much of the said decree as directed the Respondent's bill to be dismissed against the Appellant *E. Plowden*, without costs, be varied by directing that said bill be dismissed against him, with costs.—(72 Lords' Journ. for 1840, p. 37.)

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ALEXANDER CAMPBELL - - - - *Appellant.*

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DUNCAN CAMPBELL - - - - *Respondent.*

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Competency of
Appeal.
Construction of
Statutes.
Delict;
Non-Partici-
pation.
Indemnity.
Costs.

PARTNERS in a licensed distillery, convicted of a breach of the revenue laws, consented to a mitigated penalty ; after payment of which, one of them brought an action against the others for indemnity, on the ground that he was innocent of their illicit acts. The defenders pleaded in defence that, as all were involved in the delict, no one could claim indemnity or contribution from the others. The Court gave no judgment on that defence, but sent the cause to trial by a jury ; the Judge's opinion was not taken on it at the trial, nor were exceptions tendered. The jury found a verdict that the defenders were indebted to the pursuer for the sum paid by him towards the penalty. The Court being afterwards moved, upon notice "for a rule to show cause why the verdict should not be set aside and a new trial granted," refused "a rule to show cause why the verdict should not be set aside," and subsequently made orders applying the verdict, and decreeing against the defenders for payment by them jointly and severally, to the pursuer, of "the sum found by the verdict, with interest, as libelled."—

HELD, that the order refusing to set aside the verdict and grant a new trial was not, but that the orders applying the verdict were, subject to appeal to the House of Lords. (*Vide infra*, p. 178.)

Semble, that the partner who was not a participator in the delict was legally entitled to indemnity from those who were, although he consented to the penalty. (*Infra*, p. 182.)—But HELD, that the Appellant, by having omitted all opportunities of taking a decision on the legal question in the Court below, and being unable to appeal against the verdict, was precluded from having a decision on that question from this House. (*Infra*, p. 184.)

The summons in the action having claimed a certain sum from the defenders, *jointly and severally*; and the verdict having found them simply indebted in a different sum "as libelled:" HELD, that there is no inconsistency between that verdict and the judgment decreeing against the defenders, *jointly and severally*, for payment of the sum so found, "as libelled." (p. 186.)

Where an appellant has succeeded in dismissing a petition against the competency of his appeal, and the appeal is afterwards dismissed with costs, on the hearing on the merits, those costs do not include the costs of discussing the question of competency, unless the consideration of them has been reserved.

THIS was an appeal against interlocutors of the Court of Session in *Scotland*, pronounced in an

action raised there by the Respondent against the Appellant and other persons of the names of *M'Andrew* and *Hunter*. All the parties except *Hunter* were partners in a licensed distillery at *Easdale*, in *Argyle-shire*, from the beginning of the year 1820 to the end of 1822, when the partnership was dissolved. *Hunter* had been their operative distiller. The partnership concern was in six shares, of which the Appellant had two, the Respondent two, and the two *M'Andrews* one each. The Respondent resided about forty miles from the distillery, and left that business to be managed by the other partners, the chief management devolving on the Appellant, who resided on the spot. These partners and their operatives, in the course of carrying on the business, committed a breach of the revenue laws by purchasing quantities of illicit whiskey, which they mixed with the spirits produced at the distillery. The result was that, on information given to the Excise-office by *Hunter*, who quarrelled with his employers, proceedings were taken in the Exchequer in *Scotland* against the whole company, for penalties amounting to 10,500 *l.* The course of proceeding there is the same as in the Exchequer in *England*. All the partners joined in defence, put in a plea of not guilty, and tendered evidence at the trial, which took place in *December* 1823, and ended in a verdict of conviction against them all for the full amount of the penalties. They afterwards memorialized the officers of the Crown, and succeeded in getting the penalties mitigated to 3,000 *l.* To this latter proceeding the Appellant and Respondent were the active parties. Writs of extent were issued, and the sum of 3,000 *l.* was levied, partly out of the proceeds of the partnership property, partly from the

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property of the *M'Andrews*, and the residue from the Respondent.

In *April* 1827, the Respondent instituted the action in which this appeal has been taken, against the defendants before mentioned, averring his own ignorance and their knowledge of the illicit practices carried on at the distillery, and concluding for a total indemnity at their hands in respect of the said mitigated penalty, and for payment to him of what he had been obliged to pay to the Crown, namely, the balance of the penalty after deducting what was recovered under the levies on the distillery effects and from the other partners. The balance so claimed to be due to the Respondent from the defenders conjointly and severally amounted to 1,171 *l.* 5 *s.* 1 *d.*, with interest from *March* 1827.

Defences were given in by the several defenders, and a record was made up on revised condescendence and answers, with relative notes of pleas for each party. The Appellant's defence and pleas were that the action was in itself unfounded, "*First*, because it arises out of an illegal transaction, and therefore the pursuer is not entitled to maintain an action for payment of the penalty awarded against him, with his own consent, by the Court of Exchequer; more especially as he was aware of the illegal proceedings on behalf of the servant of the company, before any seizure of the company's effects was made by the Crown: *Secondly*, even if the pursuer can maintain the action at all, the defender denies that he is conjunctly or severally liable in the sum pursued for, or that the pursuer paid the whole amount of penalty and expenses as alleged in his summons."

The pleas entered for the survivor of the *M'Andrews* were in substance the same as the Appellant's. *Hun-*

ter's defence was that he was a servant acting under orders of his employers, and that he had received part of the penalty from the officers of the Crown.

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Although the defences raised the question of relevancy of the action, none of the parties applied to the Court to dispose of that question previously to the trial of the following issues, which were approved by the Lord Ordinary :—

“It being admitted that the pursuer, and the defenders, *Alexander Campbell* and *Donald M'Andrew*, and the late *John M'Andrew*, were partners of a company for the purpose of distilling spirits at *Easdale*, and that the defender, *Robert Hunter*, was brewer or distiller to the said company; and that on the 17th day of *December* 1823, the said company were found liable in a penalty of 3000 *l.*, as being guilty of contravening the revenue laws :—

“Whether the defenders, or any of them, were guilty of the said contravention of the said laws, whereby the said company were subjected in the said penalty, and obliged to pay certain expenses? And whether the defenders, or any of them, are indebted and resting owing to the pursuer in the sum of 1,171 *l.* 5 *s.* 1 *d.*, or any part thereof, with interest thereon, as the balance of the said penalty and expenses? Or whether the said contravention of the said laws was with the knowledge of the pursuer?”

These issues were tried at *Edinburgh* in *March* 1834, before the Lord President (*Boyle*) of the Second Division of the Court of Session, and the jury found for the Respondent on all of them, “and that the defenders are indebted and resting owing to the pursuer in the sum of 1,059 *l.* 5 *s.* 1 *d.*, with interest as libelled.”

The Appellant afterwards moved the Second Divi-

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sion of the Court upon this notice, “for a rule to show cause why the verdict in this case should not be set aside, and a new trial granted.” The Court refused the motion by an interlocutor, dated the 1st of *July*, in these terms:—“The Lords refuse to grant a rule to show cause why the verdict in this case should not be set aside.” And on the 4th of *July*, on the Respondent’s motion to enter up judgment on the verdict, the following interlocutor was pronounced:—“In respect of the verdict found by the jury on the issues in this cause, the Lords decern against the defenders conjunctly and severally, for payment to the pursuer of the sum of 1,059 *l.* 5 *s.* 1 *d.*, with interest as libelled; find them liable to him in expenses of the action,” &c. And by another interlocutor of the 11th of *July*, “The Lords allow the said decree for principal and interest to be extracted *ad interim*.”

The present appeal was presented on the 31st of *July* 1835, against the interlocutors of the 4th and 11th of *July* 1834 (*a*). The Respondent presented a

(*a*) A former petition of appeal, presented on the 4th of *August* 1834, complained also of the interlocutor of the 1st of *July*. The Respondent presented a petition on the 9th of *August*, praying that that appeal be dismissed as incompetent, and the House ordered that the question of competency be argued at the bar by one counsel on a side. That question was accordingly argued, and the petition against the appeal was dismissed. The appeal, however, dropped or was dismissed in consequence of the Appellant’s omitting to lodge his case in due time. In *February* 1835 the Appellant petitioned the House to restore the appeal, and that he might then have leave to lodge his case. The Respondent presented a petition praying that the appeal be not restored, or that, previously to its restoration, its competency might be again discussed by counsel at the bar, “in respect to the terms of the notice of motion of the 1st of *July* 1834, as to which the House was not on the previous occasion correctly informed.” (The House had sustained the appeal on the understanding that it did not include the interlocutor of the 1st of *July*.) Both these petitions were referred to the Appeal Committee, who reported on the 23d of *July* 1835 that the Appellant’s petition ought not be complied with. The Appellant then presented his present appeal as above stated, omitting the order of the 1st of *July*.

petition on the 26th of *August*, against the competency of the appeal, and praying that the same be dismissed with costs. That petition was referred to the Appeal Committee, who advised the question of competency to be argued at the bar by one counsel on a side.

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Dr. *Lushington*, for the Respondent on that question:—The Appellant, by his preliminary pleas to the action, raised the question of its relevancy, and he should, as he certainly might, have followed up that defence by moving the Court to dispose of the question of law before sending the case to the jury. That course of proceeding was distinctly pointed out by the Judicature Act, 6 G. 4, c. 120, by the 33d section of which it is declared that, “if either of the parties shall, without the concurrence of the other, insist that there is a point of law or relevancy which ought previously to trial to be determined, it shall be competent for such party to move for an order to have the cause remitted to the Court of Session.”—“And on such motion, it shall be determined whether the question raised ought to be decided previous to trial, or left for discussion at the trial, or for decision after verdict; and if such question shall arise before one of the chief Judges of the Jury Court, he shall have it in his power either to determine the question, or to report it for decision by the whole Judges of the Jury Court, or a quorum thereof. And the decision of the said Judge of the Jury Court in the said matter shall be final and conclusive, if not brought under review of the whole Jury Court, by motion to that effect, &c. And the decision of the Jury Court, either pronounced on the review of the said Judge’s interlocutor, or on the cause being by him taken to report, shall be final on that question.” The provision of the Judicature Act was not affected by the Act 1 W. 4, c. 69, which abo-

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lished all distinction between the Jury Court as a separate tribunal, and the Court of Session, and declared that the jurisdiction for trial by jury in civil causes, shall be united with and form part of the ordinary administration of justice in the Court of Session. That Court is frequently called on to dispose of questions of relevancy, the disposal of which precludes all further proceedings; *Aitkin v. Finlay*(b), *M'Leod v. Buchanan* (c). Had the Appellant called on the Court to dispose of the question of relevancy before trial (which he might have done without disadvantage, as in *Scotland* a defender is entitled to demur to the relevancy of an action, without being held to admit the facts set forth in the summons), the judgment of the Court on the question would be open to appeal to this House by either party. Instead of availing himself of that form of disposing of the question of law, the Appellant agreed in adjusting the terms of the issue, which was a general issue.

Another course was open to the Appellant, namely, by leaving the question of law, as well as questions of fact, to be determined at the trial of the cause (as he did in fact), there to take the direction of the presiding Judge on the matter of law, and to bring that direction, if he considered it erroneous, under review of the Court by bill of exceptions. That second course, which was open to the Appellant under the 7th section of the Act 55 *Geo.* 3, c. 42, he omitted to follow, as well as the first; and then the only other course which he could take was, in case of an erroneous verdict in point of law, either in consequence of misdirection by the presiding Judge, or of the jury finding in opposition to the Judge's direction, to move the Court to set the verdict aside, and for a new trial. It is enacted by the 6th section of the Jury Act (55

(b) 15 *Shaw & D.* 683.

(c) *Id.* 1113.

Geo. 3, c. 42), and the enactment is not affected by subsequent statutes, "That in all cases in which an issue or issues shall have been directed to be tried by a jury, it shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed the issue, for a new trial, on the ground of the verdict being contrary to evidence; on the ground of misdirection of the Judge; on the ground of the undue admission or rejection of evidence; on the ground of excess of damages, or of *res noviter veniens ad notitiam*; or for such other cause as is essential to the justice of the case: provided also that such interlocutor, granting or refusing a new trial, shall not be subject to review by reclaiming petition, or by appeal to the House of Lords." The two remedies provided by that Act are the only modes of redress against erroneous verdicts; and by the 8th section it is enacted, as to both these modes, "That if a new trial shall not be applied for or *shall be refused* (as was the case here), or if the exception to the opinion of the Judge shall be disallowed, the verdict shall be final and conclusive as to the facts found by the jury, and shall be so considered by the Court of Session in pronouncing their judgment, and *shall not be liable to be questioned anywhere*." This Appellant adopted the mode of redress of applying for a new trial; the terms of his notice of motion were, "for a rule to show cause why the verdict in this case should not be set aside and a new trial granted." That motion was refused by the interlocutor of the 1st of *July*, and that was a final and conclusive judgment according to the terms of the statute. It is true that that interlocutor is not included in the present petition of appeal; but the interlocutors which are appealed from were founded on that interlocutor, and were necessarily consequential on it; they did no more

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than apply the judgment of the Court to a general verdict, which the Court had refused to set aside; they are not decisions on points of law, and they are not subject to appeal. The point of law having never been raised in the Court below, cannot be raised in this House, for the first time, on appeal.

The *Attorney-general* (Sir *J. Campbell*), for the Appellant, submitted that the appeal was competent; that no argument was urged against it now that was not urged with equal force in 1834, on the petition of dismissal against the former appeal, which, notwithstanding, the House sustained; but that appeal expired by time. The present appeal is against the interlocutors applying the verdict, and decreeing against the defenders conjointly and severally, for payment. The Appellant was not to blame if the question of relevancy was not disposed of before the trial; he often raised that question on several motions before the Lord Ordinary, who, without regarding such applications, directed the issues. Neither could the Appellant pursue the second course pointed out, inasmuch as the Judge who presided at the trial told the jury that it was a case for them, and he left it to them upon the evidence. No bill of exceptions was competent against such a charge. Neither was it possible for the Appellant to raise, at the trial, in the form of a bill of exceptions, the subject of his preliminary defences, which did not apply to any direction required, or given at the trial, but went to exclude the action altogether on preliminary grounds. The presiding Judge held that he was bound to try the issues sent to him. The Appellant never could, by bill of exceptions, get at the subject-matter of his preliminary defences, since a discussion by bill of exceptions must have assumed that the action was a competent and relevant action, and that

the issues were calculated to try the case between the parties. No bill of exceptions could go beyond the direction given at the trial. In that situation the Appellant gave notice of two separate motions: first, to set aside the verdict; and, secondly, in the event of its being set aside, for a new trial. The last of these motions was not, nor meant to be, insisted on. It was added to the motion to set aside the verdict, in compliance with the form prescribed by the Court. There is no judgment of the Court of Session, either granting or refusing a new trial. The Appellant could not desire a new trial, for he was always opposed to a trial by jury, believing that the action was not maintainable. The only motion made was to set aside the verdict, and that motion was quite consistent with the preliminary defences. It is true, that by the 1st, 4th, and 6th sections of the 55 G. 3, c. 42, no appeal lies from an order refusing a new trial; but it is equally true that this appeal, which is not against such an order, is saved by the 9th section of that Act, which enacts, that judgments applying verdicts shall be subject to appeal.—He next referred to several sections of the Acts 59 G. 3, c. 35, and 6 G. 4, c. 120, as being in support of the right to appeal; and to the cases, *Merryweather v. Nixon* (*d*), *Colburn v. Patmore* (*e*), and *Spiers v. Dunlop* (*f*), as showing that no action could lie by one wrong-doer against his companions; and submitted that the petition against the competency of the appeal should be dismissed, with costs.

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(*d*) 8 T. Rep. 186.

(*e*) 4 Tyrwhitt, 677; S. C. 1 Crompt. M. & R. 73.

(*f*) 2 Wils. & S. 253.

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The *Lord Chancellor* :—This case was heard at your Lordships' bar some time ago, and had escaped my recollection. The suit was for recovery of a contribution from several partners, towards the payment of the amount of a verdict that had been found at the suit of the Crown against all the parties, for a breach of the excise laws. The jury having found in favour of the pursuer, an application was made to the Court of Session to set aside the verdict and grant a new trial, which was refused. Upon a subsequent application by the pursuer, the judgment of the Court proceeded in these terms :—" In respect of the verdict found by the jury on the issues in this cause, the Lords decree against the defenders, conjointly and severally, for payment to the pursuer of the sum of 1,059*l.* 5*s.* 1*d.*, with interest, as libelled." An appeal was presented to your Lordships' House, in 1834, against that decree, and against the order refusing a new trial (*g*). That was met by a petition for dismissal, upon the ground of incompetency : and to the extent of the order of the Court of Session refusing a new trial, there can be no doubt that the appeal was incompetent, inasmuch as the Act (*h*) prohibits parties from coming to this House upon orders of the Court below, upon applications for new trials. The present petition of appeal was then presented, which left out the order refusing a new trial, but appealed against the decree I have just read and another order of subsequent date consequential upon it.

The question now is, whether this appeal can be dealt with as an incompetent appeal, being against the final interlocutor of the Court of Session. There

(*g*) *Vide* note, *ante*, 170.

(*h*) 55 G. 3, c. 42.

is nothing, undoubtedly, in the Act which prohibits such an appeal. Your Lordships, however, will not fail to observe under what difficult circumstances the Appellant comes here. His real and substantial defence to the action is this: that the penalties under the excise laws being, by the verdict of a jury on behalf of the Crown, found against all the partners, one partner cannot recover, in a civil action against the others, a contribution for that which is a liability incurred by a wrong. There was a plea which set forth, to a certain extent, what was sufficient to raise that defence; but upon that plea no judgment of the Court was asked before the case was sent to a jury, and the interlocutor, referring the matter to a jury, refers it in these words:—"It being admitted" [his Lordship read the terms of the issues and the verdict of the jury, as before stated, p. 169].—Now that finding of the jury involves a question of law, as well as a question of fact; because if there was illegality in the original transaction, which prevented one partner from recovering a contribution against the others, the defenders could not be "indebted and resting owing to the pursuer." It was a point of law, therefore, arising at the trial, which must either have been assumed or decided before the jury could come to their conclusion.

Now it is said that the learned Judge who presided at the trial, did not explain to the jury what the law was. If he had been applied to at the trial to do so, he would undoubtedly have given an opinion to the jury as to whether the pursuer could recover with reference to that question. But it does not appear that any such application was made; so that neither in the first instance upon the interlocutor directing the issue, nor in the second instance, when the issue

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was at trial, did the defenders take the course which was clearly open to them, of asking the opinion of the Court, or the opinion of the Judge, as to the illegality of the transaction being an answer to the demand against them.

Under these circumstances, the finding of the jury is one that cannot now be disturbed, inasmuch as an application was made to the Court of Session for a new trial, which that Court refused, and against that interlocutor refusing a new trial no appeal can be presented to your Lordships' House. This appeal is against the interlocutor giving effect to the verdict of the jury; the jury having found that the defenders are indebted and resting owing to the pursuer in a certain sum, the interlocutor decreed that payment should be made. It is for the Appellant to consider how far, in prosecuting this appeal, he is likely to succeed. But that is not now the question before your Lordships for decision; the question now is, whether this appeal be incompetent? I find that it is an appeal against a final order of the Court of Session for payment; and I do not find anything in the statute which raises any doubt as to its being competent to a party to come here for the purpose of asking your Lordships whether that interlocutor can be supported or not. The ground of the appeal is, that the verdict does not exhaust the whole merits of the question. Whether it does or does not is a matter about which your Lordships may be able to form your opinion in looking at the pleadings, but it is not a matter before your Lordships now for decision. The question is as to whether the Appellant shall be sent away from your Lordships' bar upon the ground of having brought an appeal which it is incompetent to him to bring. It appears to me that there is no incompetency; and

I think that the petition praying that the appeal may be dismissed as incompetent, must be refused.

Competency of appeal sustained.

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The appeal came now to be heard on the merits.

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The *Attorney-general* and Mr. *Anderson*, for the Appellant:—The action brought by the Respondent, and in which he got a verdict for indemnity, was incompetent, and ought to have been dismissed upon the preliminary pleas. He and his partners having been all found guilty of the offences charged against them by the Exchequer process, and condemned in the statutory penalties, no action lay by one against the other wrong-doers for relief or indemnity against the penalties: no one of the co-partners could be permitted to recover against the others in an action founded on the Exchequer verdict and judgment, at the same time asserting his own innocence of the charge, of which by that verdict and judgment he stood legally convicted. To the justice of that conviction the Respondent assented by his active negotiation to mitigate the penalties, in which negotiation he succeeded. All these parties being involved in *pari delicto*, it was not competent to any of them to claim relief against the others; the maxim of law, which in this respect is the same in *England* and *Scotland*, being, that among wrong-doers there is no contribution nor right of equitable adjustment, far less of total indemnity; *Merryweather v. Nixon* (*j*), *Colburn v. Patmore* (*k*). In the latter case *Colburn* was proprietor of “The Court Journal,” a weekly newspaper, and *Patmore*, who was employed by him as the editor, inserted a gross libel on a per-

(*j*) 8 T. Rep. 186.

(*k*) 4 Tyrw. 677.

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son, who for that libel filed a criminal information against *Colburn*, who was convicted and sentenced to pay a fine of 100*l.*; he paid the fine, and then brought an action against *Patmore* to be reimbursed by him for the fine and costs. The jury gave a verdict for *Colburn*; but on a motion in the Court of Exchequer to arrest the judgment or set aside the verdict, Lord *Lyndhurst*, C. B., after observing on the pleadings, observes: "The question upon the merits, which we are not called upon to decide in this case, is one of very great importance. I know of no case in which a person who has committed an act declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime. It is not necessary to give any opinion upon this point; but I may say, that I entertain little doubt that a person who is declared by the law to be guilty of a crime, cannot be allowed to recover damages against another who has participated in its commission." The same principle is established in the law of *Scotland*, and must obviously form part of every matured system of law. Mr. *Bell* lays down the law as to illegal contracts, and as to any attempts to enforce the obligations arising out of them; and it is evident that the same legal rule must apply to all obligations, whether founded on actual contracts or originating in transactions. "No person," he observes (*l*), "who is participant in the act of smuggling, or by whom delivery of the goods, in breach of our revenue law, is made in this country, can effectually claim under the contract."—"No claim is good, either for the delivery of contraband goods purchased as such, or for the price of them. 1. Where the buyer of the contra-

(*l*) Vol. 1 (Commentaries), 836.

band goods, knows them to be contraband, he has no claim for the delivery of them, or for damages for breach of contract; the maxim being, that in all demands upon illegal contracts, *potior est conditio possidentis et defendentis*, &c.

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The *Lord Advocate* (Mr. *Rutherford*), and Mr. *Graham Bell*, were heard on behalf of the Respondent; but the following speech of the Lord Chancellor, moving the judgment of the House, states so fully all the points made by their arguments, that it is unnecessary to repeat them.

The *Lord Chancellor*:—The facts of this case are very short and simple. It appears that the Appellant and Respondent and others were engaged in a distillery; and that in the course of certain illegal transactions which took place in the conduct of this distillery by *Alexander Campbell* and others, who had managed the business, they were guilty of an infraction of the revenue laws, by which the whole company, including the pursuer as a partner, though absent and ignorant, became liable to penalties. It appears that a prosecution having been commenced by the law officers of the Crown against the company, to recover the penalties, *Alexander Campbell* agreed that it would be expedient to make an arrangement with them, and to consent to a verdict for 3,000*l.* in order to stop the prosecution, finding that the company would be subject to a much larger sum if it proceeded. Thus arose a communication between the pursuer and *A. Campbell*, who thereupon was in terms distinctly a party to that arrangement. It was with his concurrence and consent that it was done, and it was a verdict by consent. The Respondent states that

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he became subject to pay a proportion of the sum of 3,000*l.*, and he seeks to recover from the other persons, who are those who really were guilty of the offence, an indemnity against the consequences of that verdict to which he was a party consenting. It would be very strange indeed, if by the law of *Scotland* or the law of any other country, after such a transaction as that, a party paying the money was to be left to bear the whole burden ; because the argument would equally apply to his paying the whole 3,000*l.* and asking contribution against the others. If this objection could prevail, that because these parties were all guilty of a common offence, therefore out of such a transaction no contribution could arise, it would be an answer to him if he had paid the whole, and demanded contribution only against the other parties.

But all this is entirely concluded by what has taken place in the cause ; because in the progress of the cause this objection was raised by the defenders, that no liability could arise out of this transaction. Various opportunities occurred in the earlier stages of the cause in which the judgment of the Court might have been obtained upon this defence. Those opportunities were not taken advantage of, but ultimately issues were directed which embraced the whole question in the cause ; one issue being “ whether the defenders, or any of them, are indebted and resting owing to the pursuer in the sum of 1,171 *l.* or any part thereof, with interest thereon, as the balance of the said penalty and expenses.” Upon that issue the jury could not find in favour of the pursuer, without at the same time finding against the defenders upon this question. They could not find that the defenders were owing any sums of money to the pursuer in respect of this transaction, without finding that the transaction was such as to

give rise to their liability. It was, therefore, perfectly competent to the defenders to raise the question before the jury, through the intervention of the Judge, it being a point of law, whether the transaction was such as would preclude the pursuer from any title to ask against the defenders any contribution in respect of the sums he had paid. That could have been done by taking the opinion of the Judge; and if the Judge gave an opinion contrary to what the defenders conceived to be the proper state of the law, they would have an opportunity of bringing that judgment before the Court by a bill of exceptions. It appears that no such course was taken, and the jury found a verdict in favour of the pursuer on both issues; establishing the fact that the pursuer was ignorant of the transaction, and establishing the fact that the defenders were indebted to him on account of the transaction in a certain sum. Then the Appellant, one of those defenders, takes this course: he applies for a new trial; a new trial is refused: then comes an application to the Court of Session to apply the verdict, that is, to give judgment conformably to the verdict which the jury had found. Then at all events, according to the argument at the bar, it was competent to the Appellant to show that, notwithstanding the verdict, there were objections to the Court proceeding to give judgment to enforce the liability of the defenders to the indemnity of the pursuer. But what the Appellant himself states that he did in consequence of this notice was, that he again unsuccessfully endeavoured to convince the Court that the verdict should not be applied, upon the ground that it was not sustainable in law. But that had already been decided upon the motion for a new trial; and if he ever had a case for questioning that decision in point of law, he had not taken the

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opportunity to do so, because he had not called upon the Judge to state any opinion upon that point. Of course that met with the same result which the motion for a new trial had met with. The Court pronounced judgment in favour of the pursuer.

Now again at your Lordships'—bar all the opportunities of raising the question, if the question was at all sustainable, having been omitted at the proper period in the course of proceedings in the Court of Session—the same argument is again raised. I do not say that the parties would be absolutely precluded yet, if the record came here in a state which would allow the question to be raised. But your Lordships are now called upon to deal with a record of which the verdict of a jury forms part, taken under circumstances which preclude the defenders from questioning it. The question, therefore, is not whether there is before this House any ground upon which the Court of Session ought to have refused to give effect to that verdict, but whether that verdict is now to be set aside altogether, the whole matter having come before the jury, the jury having found a verdict, and the Appellant having been in a situation in which he cannot question the finding of that verdict. It is, therefore, quite unnecessary to consider whether there be a distinction in the law of *Scotland* as compared with the law of *England* upon that subject, because after that which has taken place no question can arise. The case here is not that the parties having been jointly guilty of the offence, a joint liability is endeavoured to be raised out of those transactions; but it is that, the partnership having agreed among themselves to pay a certain sum to relieve themselves from that liability, upon that contract between themselves, one party seeks for contribution and indemnity against the others. It is unnecessary

to go into that question, because I consider it to have been entirely precluded by the course adopted below.

That exhausts the whole of the Appellant's case, as it appears in the printed papers. But then it is said that although that might be so, yet there is an inconsistency between the judgment which the Court pronounced and the verdict which the jury returned, inasmuch as the jury found that the defenders are indebted and resting owing to the pursuer in a certain sum with interest thereon as libelled, whereas the judgment was that they were jointly and severally liable. I do not make any observations upon that which is not before your Lordships, namely, upon a case which might possibly have occurred, in which the judgment might have appeared to be inconsistent with the verdict. There is no inconsistency, in the way in which I construe the language, between this judgment and the verdict; and I think your Lordships will not be very astute in construing the terms of the verdict to find out expressions and to give effect to expressions out of their natural meaning, for the purpose of defeating the obvious justice of the case. The summons claimed against these defenders jointly and severally that they owed a certain sum with interest: the jury find that the defenders are indebted and resting owing to the pursuer in the sum of 1,059*l.* 5*s.* 1*d.* with interest as libelled. Now if the words "as libelled" applied to the whole of the finding, there can be no inconsistency between the verdict and the judgment, because "as libelled" it was a joint and several liability, and instead of repeating those words in the terms of the finding, the verdict of the jury had reference to the terms of the libel in which the joint and several liability is claimed. But it is not necessary entirely to rest the case upon that, because when

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the jury find that the defenders are liable, is it inconsistent to say they are jointly and severally liable? Are they less liable because they are severally liable? The verdict is, that they are liable : it remained for the Court to adjudicate upon the extent of the liability as ascertained by the verdict. Supposing the words, "as libelled," not to apply to the whole sentence, still it would find them liable, but would not discriminate whether they were liable jointly and severally. When the case comes before the Court, the Court has this fact found by the jury, namely, that there is a liability. The Court then looks at the case as made in the pleadings, and awards judgment in the terms of the libel, namely, that they are severally as well as jointly liable. Now who is it that objects to it? *Alexander Campbell*, himself the author of the mischief, because he was the very party who agreed that the verdict should be given to the Crown for the sum of 3,000*l.*; yet he is the party now heard to object that he ought not to be individually liable to repay to the Respondent that which the jury found the Respondent entitled to receive. There is nothing in the facts of the case that would call upon the Court to confine the liability of *Alexander Campbell* to a joint liability with the others, I see nothing in the terms of the verdict inconsistent with that which the Court have done, and what they have done is entirely consistent with the terms in which the relief was asked by the summons. I apprehend, therefore, there is nothing in this latter objection, and that upon the facts of the case it is beyond all doubt that this is an appeal which ought never to have been brought to your Lordships' bar. I therefore propose to your Lordships to dismiss this appeal, and to dismiss it with costs.

Mr. *Anderson* submitted that the costs ought not to include the costs of the two petitions by the Respondent against the competency of the appeal, which had been dismissed.

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The *Lord Advocate*, for the Respondent, referred to the case of *Gray v. Forbes*(*m*), in which the House had allowed costs of unsuccessfully resisting as incompetent an appeal which was afterwards dismissed on the merits; but added that in that case there had been a reservation of the question of costs in discussing the competency, which had been overlooked in this case.

The *Lord Chancellor* :—Unless there be a reservation of the question of costs, the House never allows costs.

Ordered that the appeal be dismissed, and the interlocutors be affirmed; the Appellant to pay the Respondent the costs incurred in respect of the appeal.

(*m*) *Ante*, Vol. 5, pp. 356–379.

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25.

WILLIAM DE MONTMORENCY - - - *Appellant.*

HARVEY DEVEREUX - - - - - *Respondent.*

*Principal and
Agent.
Residuary
Legatee and
Executor.
Cestui que
Trust
and Trustee.
Accounts.
Voidable
Deed.
Confirmation.*

A TRUSTEE and executor, who had been land agent and receiver to his testator without settling accounts for several years, upon his death obtained from the *cestui que trust* and residuary legatee an agreement to continue him in the agency, and, in case of removal without just cause, to allow him the same salary ; and also a deed granting to him part of the trust estates. The agreement and the deed were prepared by the agent, who was an attorney, and executed by the principal and *cestui que trust* without legal advice ; and the deed recited, untruly, that it was granted " by last request of the testator, in consideration of the agent's services," and also in full discharge of all accounts between them. The new agency terminated in a year and a half by mutual desire of the parties ; and after a settlement of accounts to the satisfaction of the principal's legal advisers, he executed a deed approved by them confirming the former deed, and wrote letters subsequently to the agent, claiming the benefit of the latter deed, and expressing his satisfaction at having given the estate.—

HELD (affirming the decree of the Court below dismissing a bill filed to set aside both deeds, and to take the executorship and other accounts) that although the deed of gift was voidable in its origin, and could not be sustained if it stood by itself and had been impeached in reasonable time, yet that the subsequent deliberate acts of the party impeaching it, assisted by his legal advisers, made it valid and binding on him.

It is to be assumed that legal advisers, in discharge of their duty to their client, investigate suspicious transactions, and satisfy themselves before they approve them that it is for the client's benefit to confirm them.

Costs. Where a transaction of a suspicious nature in its commencement can only be sustained by subsequent acts of confirmation, the party so sustaining it must pay his own costs of the investigation into the circumstances.

SIR WILLIAM RYVES DE MONTMORENCY, baronet, late of *Upperwood*, in the county of *Kilkenny*, deceased (the father of the Appellant), was tenant for life of estates of the yearly value of about 1,500*l.*, known as the *Kilcreene* estates, situate in the

said county, and was owner in fee of other estates, also situate in that county, of the yearly value of about 2,600*l.*; and of an estate called *Cooldrina*, situate in the county of *Dublin*, of the yearly value of about 100*l.* The Respondent was an attorney residing in the city of *Kilkenny*, from which *Upperwood* is only a few miles distant; and, being a relation of Sir *William*, was employed by him from the year 1818 until his death in 1829, as his land agent and receiver of his rents over the whole of his estates in the county of *Kilkenny*, at a salary of 200*l.* a year. He also acted during that period as law adviser of Sir *William*, and conducted some local law business on his behalf, his principal solicitors residing in *Dublin*.

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Sir *W. de Montmorency* died on the 14th of *April* 1829, having by his will, dated the 13th, devised all his estates in the county of *Kilkenny*, together with his said estate of *Cooldrina*, in the county of *Dublin*, to the Respondent, in trust to permit the Appellant (his illegitimate son), his heirs and assigns, to have and enjoy the same for ever, subject to the testator's debts and funeral expenses, and to a life annuity of 50*l.* to one *Jordan*; and the testator gave all his personal estate to the Appellant, and appointed him his residuary legatee, and appointed the Respondent sole executor of his said will; which was proved by the Respondent in the month of *June* then next ensuing.

On the 18th of *April* 1829, (the day after Sir *William* was buried), the following letter and a deed afterwards stated, were brought by the Respondent's brother-in-law to the Appellant's house ready for execution, and he duly signed them both:—

“*Upperwood, April* 18, 1829.

“My dear Sir,

“It was the anxious wish of my poor father that you

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should continue during your life to manage my affairs as agent, in the same way you did for so many years for him, at the same salary. His confidence and esteem for you was evinced by his appointing you trustee to his will, and desiring I should give you *Cooldrina* property. I have now to hope and request you will continue my agent and manager of my affairs, and I now appoint you to that situation during your life at the former salary of 200*l.* a year, on the following conditions: that you shall faithfully and attentively discharge the duties of such office, and pay over and account to me, at least once in every year, all rents or other monies of mine that may get into your hands; and as an inducement to you to accept such, I promise not to remove you, and if I shall do so without just cause at any future time, I bind myself to allow and pay you that salary.

“ I am, &c. *H^m. de Montmorency.*

“ To *Harvey Devereux, Esq. Kilkenny.*”

By the deed, also dated the 18th of *April* 1829, and made between the Appellant and Respondent,—after reciting the said will, and that, immediately after the execution thereof, the testator directed and requested the Appellant to grant and convey the said estate of *Cooldrina* unto the Respondent in consideration of his many years faithful services rendered to the testator, and in full discharge of all accounts, claims, or debts between the testator and the Respondent,—it was witnessed that the Appellant, in consideration of the said direction and request, and of 10*s.* paid to him by the Respondent, granted and assigned to the Respondent, his heirs and assigns, the said estate of *Cooldrina*, and the reversion and reversions, &c.

The Respondent continued to act for the Appellant

as agent and receiver of rents, as he had before acted for his father; and as executor also, he had possession of some of the title-deeds, and possessed himself of part of the personal estate. In the month of *June* 1829, the Respondent, after proving the will in *Dublin*, accompanied the Appellant to *Freshford*, a town in the centre of some of the estates devised by the will, for the purpose of introducing him to the tenants, who assembled together with a large number of other persons to receive them, and made a bonfire and other demonstrations of rejoicing on the occasion. The Respondent, from the Appellant's carriage, addressed the assembled crowd in a speech, and, referring to a report that had got abroad that Lord *Crofton* (heir-at-law of the said testator) was about claiming the devised estates, he exhorted the Appellant and tenants not to have any apprehension, for that his Lordship would never succeed; the secret was locked up in his own bosom, and there it would remain, and he never failed in any of his undertakings; or words to that effect (a).

In *October* 1830, the Appellant and Respondent were mutually disposed, the former to withdraw the agency, and the latter to relinquish it; and with that view the Respondent's accounts of receipts and disbursements, both as agent and executor, with the vouchers, &c., were referred for examination and adjustment to Messrs. *Aiken & Montgomery*, solicitors in *Dublin* (who had been for many years solicitors to Sir *W. De Montmorency*), on behalf of the Appellant, and to Mr. *Maher*, the partner of the Respondent, on his behalf. On the agency accounts, since the death of the testator, a balance of 2,700*l.* appeared due to the Respondent, and also 500*l.* on the executorship accounts.

(a) Vide the Evidence, *post*, p. 204.

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Upon the proposal of Messrs. *Aiken & Montgomery*, it was agreed, in order to settle all accounts of every kind between the Appellant and Respondent, that Respondent should strike off the 500*l.*, and accept bonds for the sum of 2,700*l.* and that all accounts and dealings between them should be closed; and with that view a deed was prepared, and after being perused by Messrs. *Aiken & Montgomery*, was executed by both parties.

By this deed, which bore date the 18th of *December* 1830, it was witnessed, that all accounts of whatever kind theretofore or then depending between the Appellant and Respondent, in relation to any dealings whatsoever, had been and were then finally settled; as well those relating to the dealings between the Respondent and the late Sir *W. De Montmorency*, as those between the Respondent and the Appellant; and that the Appellant had agreed to secure to the Respondent the sum of 2,700*l.* in full, for the balance due on such accounts, by two bonds, one payable in three years, with interest at 5*l. per cent.*; the other in five years, with interest at 6*l. per cent.*; and that the Respondent agreed to accept the said sum, it being, however, understood and declared that he was to pay two bills of exchange for 456*l.* and 400*l.*, drawn by the Respondent and accepted by Appellant, and then overdue, and all costs of proceedings taken by the holders of them against the Appellant, and to save the Appellant harmless against all debts and demands, which were set forth in the Respondent's accounts as theretofore paid by him on account of Sir *W. De Montmorency* or of the Appellant; and that thereby the Respondent undertook, by deed or otherwise, as counsel should advise, to assign to the Appellant all the estates and properties devised and bequeathed by the

will of the said testator unto the Respondent as trustee, save and except the lands of *Cooldrina*, which the Appellant had theretofore conveyed to the Respondent, and the conveyance whereof he by this deed fully confirmed.

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The two bonds were executed at the same time. Subsequent transactions between the parties are hereinafter stated.

In *April* 1835 the Appellant filed his bill in the Court of Chancery in *Ireland*, for the purpose of setting aside the said two deeds and the bonds, as having been obtained from him by fraud and undue influence. The bill, as afterwards amended, in addition to the matters before stated, and which were not disputed, further stated and charged, among other things, that the estates devised to the Appellant were at the date of such devise subject to judgment debts to the amount of 10,000*l.* to Mr. *John Smithwick*, father-in-law of the Respondent, by virtue of several judgments obtained by *Smithwick* against the testator; and for better securing the same, the Appellant was obliged to execute a mortgage to *Smithwick* of the said estates, in *December* 1830: That the Respondent had not settled any account of the rents of the estates with the testator for many years previous to his death, nor with the Appellant since: That immediately after the testator's death a report was circulated, at the instance of the Respondent, that Lord *Crofton* intended to set up a claim to the estates, as heir-at-law of the testator, and to impeach the will: That on the day after the interment of the testator, the Respondent sent *Edmond Smithwick*, his brother-in-law, to inform Appellant that Lord *Crofton* was in the neighbourhood inquiring for the Respondent, but that Respondent kept out of the way; and he

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(*Smithwick*) in the most earnest manner advised Appellant to make a friend of the Respondent: That on that occasion *Smithwick* produced, ready prepared, a power of attorney to appoint Respondent agent to collect the rents of the estates, and a deed, purporting to give 200*l.* to Respondent, in case of being discontinued as such agent; and also a conveyance, bearing date the same day (18th *April*), whereby the Appellant purported to convey to the Respondent the estate of *Cooldrina*; and that in consequence of the impression made upon Appellant's mind by the said *E. Smithwick* that the Respondent could take the estates from him or leave them with him, he executed the said power of attorney and deeds so produced to him, without receiving any consideration whatever for the same: That he was grossly deceived and imposed on in these transactions, and prevailed upon by unfair means and practices used on behalf of the Respondent to execute the said deed and conveyance of *Cooldrina*, the Respondent refusing to put him in possession of the devised estates, or of the deeds and writings relating thereto, unless Appellant executed the said instruments, for the preparing of which he never gave any instructions or directions to any person, nor was any of them prepared by any person employed by him, but were all prepared by and under the direction and instructions of the Respondent, and produced to Appellant, ready for his execution thereof, by the said *Ed. Smithwick*, who, after they were executed, declared that Appellant had thereby made a friend of the Respondent, and the Respondent, immediately after the instruments were executed, gave Appellant possession of the said estates, except *Cooldrina*.

The bill further stated, that a speech which the Respondent addressed to the tenantry (in *June* 1829)

stating that rumours had gone abroad as to the Appellant's want of title to the estates, but that Appellant might rest secure, inasmuch as the secret by which he could be disturbed rested solely with the Respondent, was made for the purpose of intimidating the Appellant and bringing him into such terms as the Respondent deemed best calculated for his future objects: That the settlement of accounts which took place after the agency was terminated (in *October* 1830), and by which the Appellant appeared indebted to the Respondent in the sum of 2,700*l.*, was confined to the accounts between the Appellant and Respondent as agent only, and since the execution of the power of attorney before-mentioned, but did not include the account of the personal estate and effects of the said testator: That, accordingly, Messrs. *Aiken & Montgomery*, at whose office the deed and bonds executed by Appellant in *December* 1830 were drawn up, perceiving the defective settlement of the accounts, declined to witness the execution of said deed: That although that deed purported to confirm the deed of *April* 1829, the Appellant submitted that it had not that effect, and did not operate to release the Respondent as executor, inasmuch as no account was furnished by him of the dealings between him and the testator in his lifetime, nor on foot of the personal estate of the testator, and inasmuch as the Appellant executed that deed under the impression that the Respondent had the power to invalidate his title to the estates, and threatened to take legal proceedings for the said sum of 2,700*l.*, and refused to give up the agency until the same was paid; and the Appellant was then in very embarrassed circumstances, and the Respondent had retained possession of title-deeds relating to the estates, and his father-in-law, *John Smithwick*, being a credi-

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tor to a large amount on the said judgments, compelled him to execute to him a mortgage of the said estates on the same day on which the deed purporting to confirm the deed of *April* 1829 was executed: That Appellant had lately paid off the said mortgage debt, with a view to file this bill to impeach the said deeds, which, under the circumstances before stated, he could not sooner do: and so well aware was the Respondent of the impeachable nature of the deed and other transactions of the 18th of *April* 1829, that he made no claim for payment of the said annuity of 200*l.* since he was discharged from the agency.

The bill further charged, that although no costs were due to the Respondent in the character of attorney and solicitor to the said testator, and notwithstanding the Respondent's agreement in the said deed of *December* 1830, yet in 1833, *J. Maher*, Respondent's partner as attorney, brought an action against Appellant for costs, amounting to 576*l.*; for business alleged to have been done for the said testator in his lifetime; and in discharge thereof the Appellant paid the said *Maher* the sum of 135*l.*; and the said action had been brought with the privity and for the benefit of the Respondent; and the Appellant charged that if any costs were ever due to the Respondent from the said testator, the same formed no part of the consideration of the said deed of the 18th of *April* 1829.

The bill prayed, among other things, that it might be referred to the Master to take an account of the personal estate and effects of the said Sir *W. De Montmorency*, possessed or received by the Respondent or to his use, or which but for his wilful default or neglect might have been possessed or received by him; and that an account might be taken of all sums received by or for the use of the Respondent, belonging

to the said Sir *William* or his estate, during his lifetime, as his agent, and what was due to the said testator at the time of his death by the Respondent, on such agency account; and that it might be declared that the said deed of conveyance of the lands of *Cool-drina*, of the 18th of *April* 1829, and said annuity deed, were fraudulent and void; and that the Respondent might be decreed to reconvey to Appellant said lands, and to come to an account of the rents and profits thereof received by the Respondent or for his use, from the execution of such deed, and that he might release said annuity; and that said deed of 18th of *December* 1830, might likewise be declared fraudulent and void, so far as the same purported to confirm the said conveyance of 18th *April* 1829, or to release the Respondent on foot of the accounts sought by the bill.

The Respondent, by his answer, admitted that he had not settled any account of the rents of the said estates, or of his other dealings with the said testator, since the 14th of *November* 1821, but he had furnished five accounts to the testator from that day to *November* 1825, all which he believed were examined by the testator, but not signed by him. And he stated that on the day of the death of the testator, Mr. *W. Baily*, who was entitled in remainder to the said *Kilcreene* estate, expectant on the death of the testator, came to testator's house on the day of his death, and insisted on getting the title-deeds to that estate; but upon search, the title-deeds relating thereto appearing very numerous and mixed up with other deeds, Mr. *Baily* and the Appellant agreed that all the deeds should be given to Respondent, to select and hand over to each party the deeds belonging to each; that all the deeds were accordingly brought to Respondent's house, and it was

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in that way the said deeds came into his possession, and he had since given up to Appellant, or to his agent, all the deeds and documents belonging to him.

The Respondent admitted, that immediately after the death of the said testator a report was circulated, according to what Respondent believed to be the fact, that Lord *Crofton* intended to claim the devised estates and to impeach the said will, but he utterly denied that the report originated with him; that Lord *Crofton's* solicitors came to him and talked with him on the subject of the will, and Respondent assured them of its validity. He also admitted that he did, at the Appellant's request, address his tenantry on the occasion in the bill mentioned: he could not, at that distance of time, recollect what he particularly said on that occasion, but his object in referring to the Appellant's title being disputed, if he did refer thereto, was to convince the tenantry that Lord *Crofton's* claim was groundless, and that the Respondent had it in his power to prove it such, and to prevent the tenants from giving up possession or affording any aid to Lord *Crofton* and his agents, who were then seeking to get possession of the said estates. And the Respondent denied that such speech was made by him with a view to his own interest, or to any future object of his own, or for the purpose of intimidating the Appellant.

The Respondent, in his said answer, further said, it was wholly untrue, that on the day after the interment of the said testator, or at any other time, he sent by the said *Edmond Smithwick* or any other person, to the Respondent, any such instruments as in the bill mentioned in that behalf; but he said, that on the 17th of *April* 1829, and without any previous solicitation on his (Respondent's) part, the Appellant

informed him, through Dr. *Cullinan*, the medical attendant of the late Sir *William*, and also a friend of Appellant, that it was the Appellant's intention to give Respondent the estate of *Cooldrina*, as a testimony of his own and his late father's esteem for the Respondent; and that the Appellant was likewise anxious to continue the Respondent as his agent, at the same salary which the Respondent had received from Sir *William*: That the Respondent, in reply, expressed his obligations for the Appellant's intention with respect to the lands of *Cooldrina*, and said that he (the Respondent) would in consequence relinquish his claim against Sir *William*'s estate for costs, but declared his indifference about the agency, as he considered the Appellant to be an uncertain person, who at any moment might remove him from his situation: That upon the Appellant, on the same day, personally repeating his offer of the agency, and at the same time offering to bind himself to continue the Respondent's salary in case he should dismiss him without cause, the Respondent accepted the offer, and the Appellant thereupon directed him to have the necessary deeds and documents prepared for carrying into effect the Appellant's intentions with respect to the agency and the *Cooldrina* estate, which the Respondent accordingly did, and the deed was executed by the Appellant and Respondent in the presence of and attested by *William Mannin*, an attorney, the said *Edmond Smithwick*, and another person; and the Appellant and his wife read it over before he executed it, and both expressed their pleasure at it, and declared that the Appellant, in making this gift to the Respondent, was carrying into effect the wishes of Sir *W. De Montmorency*.

And the answer stated, that the Respondent con-

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tinued to act as the Appellant's agent for about a year and a half, but having, during that period, made advances to the Appellant considerably exceeding the rents of his estates, the Respondent became desirous to relinquish the agency, and in *October* 1830 he intimated to the Appellant such his intention, and thereupon furnished to him the accounts of his receipts and disbursements as his agent, and also of his receipts and disbursements as executor of Sir *W. De Montmorency*, which last-mentioned receipts consisted of arrears of rent due to the said testator at his death, and afterwards got in by the Respondent: That these accounts, and the vouchers in support thereof, were fully examined by Messrs. *Aiken & Montgomery*, the Appellant's solicitors, and Mr. *John Robert Malone*, who succeeded Respondent in the agency; and it appeared thereby, as the fact was, that a sum of about 2,700 *l.* was due to the Respondent on the balance of his agency account, and a sum of above 500 *l.* on the balance of his executorship account; and after a full discussion of the affairs between the Appellant and Respondent, during which the Respondent, at the request of Messrs. *Aiken & Montgomery*, consented to give up all claim on account of transactions between him and Sir *W. De Montmorency*, it was agreed that the Respondent, in order to settle all accounts of every kind between himself and the Appellant, should accept the Appellant's bonds for the sum of 2,700 *l.* in discharge of the monies due to the Respondent, and that all accounts and dealings between them should be finally closed, and that such a deed as before stated should be executed: That a deed was thereupon prepared, and was perused by Messrs. *Aiken & Montgomery*, as the solicitors of the Appellant, and, after certain alterations had been

made by them, was approved by them, and a written indorsement of approval was put upon the draft of the deed by Mr. *Montgomery*: That Messrs. *Aiken & Montgomery*, and Mr. *Malone*, attended on behalf of the Appellant at the execution of this deed, and Messrs. *Aiken & Montgomery*, or one of them, perused aloud the ingrossment thereof in the presence of the Appellant, before it was executed by him and the Respondent: That if they refused to attest the said deed it was because they were personally interested in its provisions, the costs due to them from Sir *W. De Montmorency* being thereby secured to them. The Respondent answered as to his law costs against Sir *W. De Montmorency*, thus given up in the settlement, that he always considered he was entitled to those costs, as they were perfectly distinct from his salary as agent and receiver; but he had every reason to expect, and did in fact believe, from his relationship to the said testator, and from the kind disposition always manifested by the testator towards him, that he would, during his life, or upon his death, have made some adequate remuneration for his professional services; and that for that reason, and no other, he did not bring his said costs into account with the testator, with whom he continued on the most confidential terms up to his death.

The Respondent in his answer further said, he had not made any claim against the Appellant in respect of the annuity of 200*l.*, not from any conviction of the impeachable nature of the transaction of the 18th of *April* 1829, as in the bill alleged, but because, having voluntarily resigned the agency, and not being removed therefrom, he could not make claim to the annuity, which was provided for the latter contingency only: That upon the said settlement of

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accounts Respondent gave up to the Appellant or his agents all the vouchers for his accounts, and then, or shortly afterwards, he also gave up all such deeds and papers as remained in his possession belonging to the Appellant; and the Appellant acquiesced for several years in the said arrangement, without ever expressing any intention to disturb it; on the contrary, that he wrote two letters to Respondent, to which (they are set out in the evidence) the Respondent referred as evidence of acquiescence.

The Respondent admitted that his partner, *John Maher*, furnished a bill of costs to the Appellant, amounting to the sum of 524*l.* 15*s.* 10 $\frac{1}{2}$ *d.*, and that he commenced an action for the recovery thereof: That the said costs were for business done, both for the testator in his lifetime, and for the Appellant after testator's decease; but that, although *Maher* was the Respondent's partner, there had been since the commencement of their partnership, several branches of the profession in the emoluments of which, by the express terms of their partnership, the Respondent had no share: That a considerable portion of the business charged for by *Maher* was of this description; and that the said bill of costs contained a charge against the Appellant himself, for business done by *Maher*, of the sum of 272*l.*: That the Respondent had heard and believed that the main ground of the Appellant's defence to *Maher's* demand of 524*l.* 15*s.* 10 $\frac{1}{2}$ *d.* was that, by reason of the execution of the said deeds of the 18th of *April* 1829 and 18th *December* 1830, the Appellant was not liable to the payment of the portion of the said costs incurred in the lifetime of his father; thereby, as the Respondent submitted, distinctly availing himself of the provisions of the said deeds, which he by his said bill sought to

impeach: That the Respondent had heard and believed that *Maher*, in order to avoid litigation, agreed to accept as a compromise from the Appellant a sum of 135*l.* in full discharge of such part of the said bill of costs as the said *Maher* was entitled to claim against the Appellant himself; and that upon the settlement between the Appellant and *Maher*, all the costs for business done in the lifetime of the said testator were by consent struck out in the first instance, and the sum of 135 *l.* was accepted on the foot of the balance of 272*l.*, which sum of 135 *l.* was not, as the Respondent believed, near the amount of the description of the said costs which *Maher* was entitled to as his own, and no part of it was for the benefit of the Respondent.

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The answer then submitted that the Appellant was barred from obtaining the accounts sought by the bill, by the said deed of the 18th of *December* 1830, as well as by the Statute of Limitation (more than six years having elapsed between the testator's death and the filing of the bill); and, without waiving these objections, concluded by referring to the schedules annexed thereto, as containing certain of the accounts sought by the bill, so far as the Respondent was able to set forth the same.

Witnesses were examined on both sides in the cause.

The Appellant's evidence was to the following effect:—

Mr. *W. Mannin* of *Freshford*, an attorney, witnessed the execution of the deed of the 18th of *April* 1829: was not engaged in the preparation of it; believed it was prepared by the Respondent: it was not submitted for witness's approval, nor did he in any manner approve of it on behalf of the Appellant, fur-

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ther than by becoming a subscribing witness through the means of the Respondent's brother-in-law, *Ed. Smithwick*, who had the carriage of it previous to its execution, previous to which witness had no conversation with the Appellant about it; but the Appellant often afterwards expressed his regret at being induced to convey the said lands.

This witness said he was present when the Respondent made the speech (before mentioned). There were about 500 persons present on the occasion, composed chiefly of the tenantry, to whom the Respondent said in his speech, that "with him and him only lay the secret that could disturb the Appellant in the possession of his estates, and with him it should remain; and if the parties claiming the estates went to law, he would take care and defeat them, as he was always successful in all cases in which he was concerned;" or words to that effect. The Appellant and Respondent were at that time together in Appellant's carriage. Lord *Crofton* was then setting up a claim to the estates, and witness believed it was for the purpose of making a friend of the Respondent and securing his interest, that Appellant was induced to execute the deed, being a man of weak mind, very timid, and quite incapable of managing his affairs, or of judging what was best to be done in the settlement of them.

William Fitzpatrick said he was present when the said speech was made. It was on the occasion of the Appellant coming to the country after the death of his father that the tenantry met him in the town of *Freshford*. The Respondent, from the Appellant's carriage, stated "that reports were in circulation that Lord *Crofton* had intended to proceed at law against Mr. *De Montmorency*, for recovery of his property; that he (Respondent) defied them all, for that no person knew what would injure him (the Appellant) respecting the

estates and the title, or knew the secret that would do so, but he (the Respondent), and that he would keep it to himself ;” or words to that effect.

Mr. *Andrew Thomas Montgomery*, of *Dublin*, solicitor, said he had been employed with the late *Samuel Aiken*, his partner, as solicitor for Sir *W. De Montmorency*, and conducted all his law business for 20 years up to his death, during which time Sir *William* had no other law agent, although on one occasion the Respondent had brought an ejectment at the suit of Sir *William*, who, however, on being told of it by witness, said he was entirely ignorant of it, and would inquire into the matter, which he subsequently did, and stated to witness that Respondent informed him there had not been time to write to *Dublin* on the subject ; and Sir *William* declared the like matter should not occur again, as he had entrusted his law agency to witness and partner.

This witness had frequent conversations with the Respondent respecting the devise of the estates to the Appellant ; never recollected anything prejudicial to his title said by the Respondent, but he distinctly stated that he knew of circumstances connected with the estates that would ruin the Appellant’s prospects of which no other person than himself was aware : and he added that Appellant was not using him well, but that at the same time he never would injure him. Witness was employed on the part of Appellant on the occasion of the execution of the deed dated the 18th of *December* 1830, and gave this account of what passed :—“ The Respondent furnished accounts to the Appellant on that occasion, and we were proceeding to investigation of them, when I perceived they would occupy a considerable time ; I proposed to the defendant to strike off a certain sum of money off his demand, and thereby

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settle all matters between them ; whereupon the defendant agreed, and a considerable sum was struck off, amounting, as I best recollect, to above 500 *l.*, and no further investigation or examination of said accounts was had, although we had previously examined various vouchers in respect thereto, and I looked upon them to have been finally settled between them, although neither party appeared pleased. After that arrangement, the balance of said account was the sum mentioned and ascertained as the consideration of said deed. As I best recollect and believe, I made objections to the draft of said deed of *December* 1830, because it contained a recognition of a previous conveyance of the lands of *Cooldrina*, which I conceived had nothing to say to the transaction then pending; and I also insisted that the claim which my partner and myself had for costs against the late Sir *W. De Montmorency* should be recognised in said deed, as defendant was his sole executor. The defendant refused to listen to my objection respecting the conveyance of the lands of *Cooldrina*, but he acquiesced in that part respecting his liability to us as executor of Sir *William*, in respect to said costs: I reluctantly acquiesced in the execution of that deed, recognizing the conveyance of *Cooldrina*, in consequence of the necessitous state of the plaintiff's affairs at the time. *Richard Smithwick*, son to *John Smithwick*, in the pleadings named, was present upon the occasion of the aforesaid arrangement of said accounts; and, as I best recollect, at the execution of said deed he attended on behalf of said *John Smithwick*, who had claims to a considerable amount against the estate of the late Sir *W. De Montmorency*, and he urged in the strongest manner the arrangement of defendant's accounts and the execution of said deed,

for the purpose of getting a mortgage executed to secure the claims which his father had made upon said lands. I refused to become an attesting witness to said deed, first, because my own claims were recognized in it; and secondly, that my doing so might operate to bind the plaintiff thereto at a future time, as he declared that he was not satisfied with the arrangements so made."

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The Respondent's evidence was to the effect following:—

Mr. *William Baily*, tenant in remainder of the *Kilcreene* estate expectant on the death of Sir *W. De Montmorency*, said he went to his house the day after his death and required the title-deeds of that estate: the Appellant and Respondent were present; both agreed that all the deeds and documents in the house should be sent on to *Kilkenny*, to the house of the Respondent, to select and separate the deeds belonging to witness and Appellant, and they were sent on accordingly. Witness added, that there was a strong report prevalent in the county at the time of Sir *W. De Montmorency's* death, that Lord *Crofton* intended to claim his estates at *Upperwood*, as heir-at-law, and to dispute the Appellant's title; and Lord *Crofton* told witness of such his intention.

Mr. *James Cullinan*, a medical man, practising in *Freshford*, said he attended Sir *W. De Montmorency* professionally since 1814 down to his death, and was constant in his attendance on him during the whole of his last illness. The Appellant was in constant attendance. Witness then went on to state to this effect:—On the day of the interment of Sir *William*, while the Appellant and this witness and two or three others were at dinner at *Upperwood*, immediately after dinner

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Appellant told witness that he had determined on giving *Cooldrina* to the Respondent, and to employ him as his agent and receiver at the same salary that his father paid him; and Appellant desired witness to inform Respondent of his said intention, at the same time placing his hands on witness's shoulder and addressing the conversation to him particularly. To the best of witness's recollection, Mr. *W. Mannin* was one of the persons then present, and it was on the 16th of *April* 1829. On the 17th, witness met the Respondent as he was going to *Upperwood*, and communicated to him the said declaration and message, in the same or nearly the same words used by the Appellant, and with his authority, as witness conceived. The Respondant's reply was, that he would have nothing to do with *Cooldrina* or the agency until he had first put the Appellant in possession of his property under the will, for which purpose he had then come from *Kilkenny*; adding, that he was afraid to have anything to do with the Appellant, as he was a man not to be depended on, and that he was apprehensive of offending his own friends by connecting himself with the Appellant. Witness did not give the Respondent any directions as to the manner of carrying the said proposal into execution. He told the Appellant in ten minutes afterwards that he had delivered the message to the Respondent; and in the course of the same day, after the Respondant had given formal possession to the Appellant of the property left him by the will, by delivery of a sod and twig, the Appellant told witness that he had arranged matters with the Respondent and would give him his agency: they had a great deal of conversation together during the day, but witness did not hear much of it. Witness further said, that there was a report, before and after the death of Sir *Wil-*

ham, that Lord *Crofton*, as his heir-at law, would dispute his will and the Appellant's title.

Mr. *Edmond Smithwick*, brother-in-law of the Respondent, said he was a subscribing witness to the deed of the 18th of *April* 1829. He said Mr. *Mannin* was another subscribing witness: and the deed was first carefully read by the Appellant in presence of his wife and of Mr. *Mannin*, who, as witness believes, also perused it, and the subject-matter was talked over before the deed was executed. Witness held out no threat or inducement to the Appellant to execute that deed. When witness produced the deed to the Appellant, he requested him to consult his wife, and for both seriously to consider the matter before executing the deed; and they both in the presence of witness and of Mr. *Mannin*, expressed their great delight in having it in their power to make the said deed; and the Appellant added that it was the wish of his late father that he should pay the Respondent a compliment for his many and long services.

Mr. *J. Maher*, an attorney and partner of the Respondent, said he was employed by him in *October* 1830 to arrange accounts between him and the Appellant, consisting, on the credit side, of various sums of money paid by the Respondent on account of Sir *W. De Montmorency*, after his death, and on account of the Appellant from that time down to *November* 1830; and consisting, on the debit side, of monies received by the Respondent, as well on account of the assets of Sir *William* as of the rents and profits of the Appellant's estates, over which the Respondent acted as agent and receiver. There was a final settlement, and not a speedy and immediate settlement, of the said accounts in *December* 1830, at the house of Mr. *Aiken*, one of the Appellant's solicitors in *Dublin*, in the presence of Appel-

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lant and Respondent. The investigation began on the 8th *October* 1830, and did not terminate till the end of *December*. Some of the items in the account were checked off by the Appellant or by his solicitors, Messrs. *Aiken & Montgomery*, and by his agent Mr. *Malone*, who all attended the investigation as Appellant's professional advisers. The original accounts and vouchers were handed over to the Appellant; several deeds and papers, including the probate of the will of Sir *W. De Montmorency*, were handed over by Appellant's direction to his agent *Malone*, immediately after closing the settlement of the accounts. The terms of the settlement were that Respondent agreed, with a view to put an end to all disputes, to accept bonds for 2,700 *l.* in satisfaction of a considerable balance which was found to be due to him on foot of the said accounts, and the Appellant agreed to give such bonds, and the parties were to execute mutual releases. No one present made any objection to that arrangement, but all seemed greatly pleased with it. Witness accordingly prepared a deed, which (the draft thereof having been perused and altered and then approved by Messrs. *Aiken & Montgomery* on behalf of the Appellant) was executed by him and the Respondent, after a covenant had been added for securing the right of Messrs. *Aiken & Montgomery* to seek from the Respondent costs due to them from Sir *W. De Montmorency*.—[This was the deed of the 18th of *December* 1830, before stated.]

Among the papers proved as exhibits on either side, besides the deeds and writings already stated, were the following:—A letter from Mr. *Aiken* (partner of Mr. *Montgomery*), to the Respondent, dated *Dublin*, April 28, 1829, in which the writer says, "I forward you a schedule of such of the title papers of the late Sir *W. De Montmorency* as are in our hands. I find

Mr. *Geale*, solicitor for Lord *Crofton*, has taken out a copy of the late recovery and deed leading the uses thereof. This I mention to put you on your guard.” [This letter was intended to prove that Lord *Crofton* was then about disputing Appellant’s title to the estates.]

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A letter from the same to the same, dated the 13th of *October* 1830, contained this passage: “Bring up, when you come, the conveyance to you of *Cooldrina*, in which it is said is embodied a general release as between you and Mr. *De Montmorency*. I pray of you by no means to omit bringing up this deed, and in a word all such other deeds, papers, &c. as relate to the accounts, which I think may be yet amicably settled.”—[The object in proving this exhibit was to show that pending the settlement of the accounts, and before the execution of the deed of the 18th of *December* 1830, the attention of Messrs. *Aiken & Montgomery*, Appellant’s solicitors, had been directed to the deed of the 18th of *April* 1829.]

A letter from Mr. *Aiken* to Mr. *Maher*, dated *November* 12, 1830, was in these terms: “I am authorized to say that as Mr. *Devereux* has agreed not to bring forward or make any other charge against Mr. *De Montmorency*, for any money transactions or dealings which were had or took place between Mr. *Devereux* and the late Sir *William*, and that the same shall be for ever done away with,—that Mr. *De Montmorency* will accede to the arrangement proposed this evening. I therefore submit to you that an entire new account should be prepared on the part of Mr. *Devereux*, and be confined to such money transactions and dealings as took place between Mr. *Devereux* and Mr. *De Montmorency* since Sir *William*’s death; which account I should hope may be made out,

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produced, gone into, vouched, and finally settled on the meeting appointed for to-morrow."

The draft of the deed of *December* 1830, with ~~the~~ *is* indorsement, "I approve of this draft on behalf of *W. De Montmorency, Esq.—A. T. Montgomery,*" ~~was~~ *as* also proved as an exhibit, as well as the deed itself, and also the two following letters, which were referred to in Respondent's answer as showing the Appellant's acquiescence in the settlement, and other matters referred to in the last-mentioned deed.

"*Upperwood, 16th November 1831.*

"Dear *Harvey,*

"Mrs. *Darby*, the widow of *George Darby*, called on me this morning for the balance of an account alleged by her to be due to her late husband, of my father. By the deed executed between you and me, you undertook the payment of all debts due of my late father, except certain debts in and on the back of the said deed excepted, and Mrs. *Darby* was not amongst those excepted; you will therefore please to let her know that I am not her debtor, if upon investigation anything be really due to her.

"And believe me truly yours, *W. De Montmorency.*"

"*Upperwood, 14th October 1832.*

"My dear *Harvey,*

"I understand that some evil-minded person has told you lately that I repented giving you *Cooldrina*. I can assure you I never did say so, nor neither did I ever repent giving it to you; and whoever told you so, told you a great falsehood. I should feel sorry that you should think for a moment that I should say so; I only wish that *Cooldrina* was better for your sake, and I wish it was able to produce you ten times as much as it is.

"And now believe me, my dear *Harvey*, yours obliged, *Wm. De Montmorency.*"

Several schedules of accounts referred to in the pleadings were proved as exhibits, including a schedule annexed to the deed of *December* 1830, by which it appeared that there were debts to the amount of 11,690 *l.* against the estates left to Appellant by Sir *W. De Montmorency*, and not charged in the accounts of the Respondent, who by the provisions of the said deed undertook to discharge all the other debts against Sir *William* and the estates.

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The cause was heard in *January* 1837, by the Lord Chancellor of *Ireland*, who decreed that the bill should be dismissed, without costs (*b*).

Mr. *Tinney* and Mr. *Pemberton*, for the Appellant, against that decree :—The deed dated the 18th of *April* 1829, conveying away a valuable estate from the Appellant to his own trustee and agent, was executed under such circumstances as clearly entitled the Appellant to call on a Court of Equity to set it aside, or give him other effectual relief against it. That was not only a transaction between principal and agent, *cestui que trust* and trustee, which relations would of themselves be sufficient to avoid it, but it was also a transaction effected by fraud and undue influence on the part of the agent. The deed recited that Sir *W. De Montmorency*, immediately after the execution of his will, directed and requested the Appellant to give the Respondent the estate; a recital so wholly false, that it was not even attempted to be proved. The deed was prepared by the agent and trustee, and sent with

(*b*) The case is reported by Messrs. *Drury & Walsh*, p. 119.

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that false recital to the Appellant to be execute him, the day after his father's funeral, with a communication at the same time amounting to a threat unless he executed it, he should not have the assist of his trustee in protecting himself against the pretended claim of the heir-at-law to the estates.

Crofton made no attempt to enforce the claim, the Respondent well knew that there was no ground for such a claim, but he availed himself of the recital (which probably originated with himself, though it is not proved) to alarm the Appellant. The deed of gift granted under such circumstances of pressure, without legal advice, could not be maintained on its own stood by itself. Then could it be said that subsequent transactions set it up and confirmed it? In the circumstances and relative situation of the parties, none of the Appellant could give confirmation to the deed so as to preclude him from relief. The deed of *December 1830*, which is relied on as a confirmation, was itself voidable so far as it purported to confirm the former deed, and could not be set up as a bar to the accounts sought by the Appellant's bill. The accounts sought by him are, first, the agency accounts prior to the death of Sir *W. De Montmorency*; secondly, the executor's accounts; and thirdly, the accounts of the subsequent receipts of the rents of the Appellant's estates. The prayer of the bill and the statement of facts mix up the executor's accounts with the subsequent agency accounts; but although the pleadings are not correct in point of form, they show enough generally to entitle the Appellant to relief on the three heads of account. The Appellant asks, in addition to the accounts, to have a reconveyance of *Cooldrina* deeded to him. The Respondent having abandoned the claim of the annuity of 200*l.*, no relief is asked as to

except that the letter be given up, so that there may be no room for making any claim on it hereafter. —[The *Lord Chancellor* : The bill has allegations enough of fraud for setting aside the deed of *April 1829*, but no allegations of error in the accounts.]— Clearly the Appellant is not entitled to set aside the settled accounts without showing error and falsifying, and that is not attempted. But there was no settlement of accounts after 1821, nor any accounts at all rendered from 1825 to the time of the testator's death. The deed of gift purports to be in full discharge of all accounts, claims or debts between Sir *W. De Montmorency* and the Respondent; and the pretended settlement in 1830 commenced with the accounts as well of the agency as of the executorship from Sir *William's* death; but the Appellant, as residuary legatee, was equally entitled to have the accounts of the rents received before the testator's death. There is a complete blank in these accounts from 1825 to *April 1829*, yet the deed of *December 1830* witnesses that all accounts, of whatever nature or kind, heretofore or now depending between the parties in relation to any dealings whatsoever, have been and are now finally settled, as well those relating to such dealings or transactions as took place between the Respondent and Sir *W. De Montmorency*, as those between the Respondent and the Appellant. That was a false statement, and cannot be held to bind the Appellant. He was forced to assent to it by the same pressure of circumstances which urged him to the execution of the deed of 1829. The report of Lord *Crofton's* designs on the devised estates; the secret of which the Respondent pretended to be in possession, and by which the Appellant's title to the estates might be disturbed, and the expediency of keeping on terms with him, were as powerful mo-

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tives for executing the deed of 1830 as they were in obtaining the deed of gift. Besides, it is quite evident from the depositions of *Maher*, Respondent's witness and partner, that it was only on settlement of the accounts that the agency and Appellant's title-deeds were to be given up, so that he was completely in the Respondent's power. The mortgage debt of 10,500*l.* to the Respondent's father-in-law, a debt of 700*l.* to his brother-in-law, and other debts to other persons, making altogether near 12,000*l.*, paralysed the Appellant, a man of weak mind as the witness *Mannin* said, and rendered it impossible for him either to resist the deed of 1830, or to take proper steps for rescinding that deed or the deed of gift, until he was able, out of the rents, to free himself from some of his debts. The same influence may sufficiently account for the writing of the two letters of *November* 1831 and *October* 1832, which have been also relied on as confirming the deed of *December* 1830 and as a bar to the opening of the accounts which that deed purported to close. The Respondent artfully deprived the Appellant of the power of giving any explanation of those letters; for although the answer referred to them, they were not produced to the Appellant nor sufficiently called to his attention until the hearing of the cause. In fact it would appear, from the whole conduct of the Appellant, that he was not only under undue influence and pressure, but was also ignorant of his right to the accounts between the Respondent and Sir *W. De Montmorency*.

Mr. *Knight Bruce* and Mr. *F. H. Goldsmid*, for the Respondent:—The accounts sought by the bill of the rents received by the Respondent, as agent of Sir *W. De Montmorency*, were partly settled in his life

time, and settled accounts are not to be opened except on proof of fraud or error; *Chambers v. Goldwin* (c), *Horlock v. Smith* (d). There is no fraud nor error shown, or alleged even, in these accounts. But it is said that the accounts for the last four years of the life of Sir *W. De Montmorency* were not furnished to him, nor examined prior to the settlement of them in 1830; and that the executorship accounts were not sufficiently vouched. That was not the fault of the Respondent, but the wish of the Appellant and of those who advised him. The whole of the Respondent's accounts, as agent and executor of Sir *William*, and as agent of the Appellant, were submitted to him and Messrs. *Montgomery & Aiken*, his solicitors, and *Mr. Malone* his agent, also a solicitor; and, after some investigation, were finally settled and closed, and all demands in respect of them were released by the deed of *December* 1830. That deed was deliberately executed under advice of the Appellant's solicitors, after the arrangement carried into effect by it had been most carefully considered by them. It is not proved, nor is it true, that the Appellant was forced to execute that deed by his embarrassments: he was not in embarrassment, and if he were, that would not be sufficient reason for setting aside the deed, unless upon proof that advantage was taken of it. That there was no pressure is evident from the Respondent's taking bonds for the balances due to him, at three and five years. The Respondent gave up a claim of 500*l.* for peace and to avoid litigation; and he also gave up all his vouchers, which remain in the hands of the Appellant or his agent: so that, if these accounts are to be opened, the Appellant is wholly without the means of proving items in them, unless

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(c) 9 Ves. 254.

(d) 2 Myl. & C. 495.

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his oath may be substituted for vouchers ; an indulgence which was given to a party under similar circumstances in *Morgan v. Lewes* (e). In the case of *Horlock v. Smith*, before referred to, the Lord Chancellor observes, " If the petitioners obtained the papers from Messrs. *Goode* upon the supposition that the bill (of costs) was finally settled, intending, however, to apply afterwards for taxation, upon the ground of Messrs. *Goode*'s possession of the papers, but concealing that intention from Messrs. *Goode*, I think they ought not very easily to be allowed to take advantage of that circumstance at a future time. It was competent for them, if the papers were necessary to enable them to tax the bill, to inform Messrs. *Goode* of that necessity, &c. The petitioners, however, obtain possession of the papers from Messrs. *Goode* without any notice, leaving them under the idea that they had finally settled the account of their clients ; and then, after Messrs. *Goode* have parted with the papers, which they were entitled to retain until the bill should have been taxed, the petitioners come here and apply for a taxation (f)." So in the present case, the Appellant, after having obtained all the vouchers from the Respondent, then complains that there was no settlement of accounts. Another difficulty which the Respondent would have to contend with, in case those accounts were re-opened, arises from the Statute of Limitations preventing him from making claims against the Respondent in respect of the 1,600 *l.* costs against Sir *W. De Montmorency*, which he gave up on obtaining the conveyance of *Cooldrina*, and 500 *l.* which he gave up on the proposal of Messrs. *Montgomery & Aiken*, on the settlement in *December* 1830. That settlement was not only deliberately concluded by the

(e) 4 Dow, 29 ; see also *Morgan v. Evans*, 3 C. & F. 159. (f) 2 Myl. & C. 511.

execution of the deed of that date, but was subsequently and repeatedly confirmed by the Appellant, particularly by the letter of *November* 1831, by which he claims the benefit of the settlement and deed which he now seeks to set aside.

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The conveyance of *Cooldrina* by the deed of *April* 1829, was the deliberate, unsolicited, and voluntary act of the Appellant. *Mannin's* evidence clearly supported the case made by the Respondent as to that conveyance, and the only ground of suspicion against it is that the deed was prepared by the Respondent and sent by his brother-in-law for execution. That was not sufficient to impeach the transaction. The evidence showed that no improper influence was used; that the Appellant and his wife deliberated on the act and well understood what he was doing, and that he was carrying into effect the intention of his late father and benefactor. No weight ought to be given in this matter to the speech attributed to the Respondent, when he was introducing the Appellant to his tenants. The rumour alluded to, of Lord *Crofton's* intention, existed, and did not originate with the Respondent. If he said he possessed any secret, or if he possessed any, he never made any use of it to the prejudice of the Appellant. But if this conveyance was liable to be impeached in 1829, in consideration of the relation then existing between the parties, it was expressly confirmed by the deed of *December* 1830, although it was then brought to the attention of the Appellant and his solicitors who on that occasion objected to the clause of confirmation, but finding that the Respondent insisted on it, consented to the Appellant's execution of that deed. The gift being the voluntary act of the Appellant, and the result of his own sense of right, duty, and bounty, he ought not now to be heard to impeach it.

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Mr. *Tinney*, in reply, said the case of *Horlock v. Smith* had no application to the present. He would not object to such a direction as was stated on the other side to have been given in the case of *Morgan v. Lewes*, although it was not necessary, inasmuch as the transactions and accounts in this case were so recent, and there was no allegation of lost vouchers.

[In addition to the cases already mentioned, the following were also cited, viz. :—for the Appellant, *Hylton v. Hylton*, and *Bridgman v. Green*, 2 Ves. sen. 547 & 627; *Hatch v. Hatch*, 9 Ves. 292; *Murray v. Palmer*, and *Watt v. Grove*, 2 Sch. & Lef. 472 & 491; *Dunbar v. Tredennick*, 2 Ball & B. 304–317; Lord *Selsey v. Rhoades*, 2 Sim. & Stu. 41; *Bowen v. Kirwan*, Lloyd & G., Temp. Sugd. 47, and the cases mentioned in the note, p. 65 :—for the Respondent, Earl of *Chesterfield v. Janson*, and *Hylton v. Hylton*, 2 Ves. sen. 124 & 547; *Harris v. Tremenneere*, 15 Ves. 34; Lord *Selsey v. Rhoades*, 1 Bli. N. S. 1; *Pratt v. Barker*, 1 Sim. 1; S. C. on appeal, 4 Russ. 507; *Nicol v. Vaughan*, 2 Dow & Clark, 420, and 1 Clark & Finnelly, 49 & 495; and *Hunter v. Atkins*, 3 Myl. & K. 113.]

The *Lord Chancellor* :—This case has occupied so much time in the discussion, and has been discussed at such intervals (during three days), that I have had opportunities, since it was first opened, of carefully examining the whole of the proceedings and the evidence on each side. As the noble and learned Lord present (Lord *Wynford*) concurs with me as to the course your Lordships ought to adopt, there is no advantage in taking any further time to consider the case.

It is very important, considering the order that we shall have to propose to the House to make, and for

the benefit of those who may not be conversant with the pleadings in Courts of Equity,—as the bar of *Ireland* are represented as not being (*g*), I believe without any foundation, for I see no ground to suppose that the rules of Courts of Equity are not attended to there with great fidelity; I believe that the decisions of this House and the rules of Courts of Equity regulate their proceedings;—but it is very important that all parties should have their attention called to the various parts of the case, that there may be no misunderstanding as to the grounds upon which this House proceeds in affirming the judgment of the Court below.

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The transactions of 1829 are transactions which I cannot hesitate for a moment to say were highly suspicious, at least, and such as, without much more explanation of them than has been afforded by the evidence in this case, could not possibly be supported by a Court of Equity, if complaint had been made before any acts of confirmation had taken place. We find that on the 14th of *April* 1829, the original proprietor of this property died, and we find that so early as the 16th it is stated that a conversation took place in which the plaintiff (the Appellant) stated that he had determined to part with the estate in the way in which he afterwards did. But as early as the 18th, four days only after the death of the testator, we find a deed executed by which an estate, part of the property left to the plaintiff, is conveyed over to Mr. *Devereux*, who had been the agent, and who represented that he had also been the confidential law adviser of the testator. We find that that deed con-

(*g*) In this and other appeals from *Ireland*, argued about the same time, observations were made at the bar on the alleged want of precision in equity pleadings there.

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veyed this estate in discharge of all accounts which had been pending between the testator and himself. Now the objections to that transaction are very obvious: in the first place, the great haste with which it was done and the relative situation of the parties, the one the manager of the property, perfectly conversant therefore with all circumstances connected with it, and who procures this conveyance to himself; which professes to be a settlement of all accounts, although it was perfectly impossible, from the nature of the case and from the circumstances that took place, that there could have been any examination of those accounts. Then there is another fact, not brought out very distinctly in the evidence, but, as far as the evidence applies to it, giving rise to a strong suspicion of influence of a very improper nature exercised by *Devereux* over the plaintiff at that time; namely, the supposed possession of a secret by which, according to the representations of the witnesses, he thought he had the power of depriving the plaintiff of all his estates; some secret with regard to the title which, if revealed, would show that the plaintiff had no title. Now if that secret really existed, and was used for the purpose of obtaining the conveyance of the estate, it would be as gross a fraud and as violent a breach of duty on the part of the agent, *Devereux*, as anything that can possibly be stated.

The case upon this point stands in a very singular position, and the evidence is of a very extraordinary character. There is no evidence of such a representation having been held out to the plaintiff. The evidence is of a speech having been made by this agent at a meeting of the tenants and inhabitants of the estates, upon the plaintiff's taking possession after the death of the testator. The agent is represented as

having there stated publicly that he was in possession of a secret, that the heir-at-law would not succeed—who evidently had been making some inquiries, probably with a view of making some claim—the agent is represented as having stated publicly that he was in possession of a secret by which the plaintiff's title might be defeated, but that that secret he would keep to himself; and that, as he was so fortunate as to succeed in all contests in which he was engaged, no danger could arise to the plaintiff. Two witnesses speak to having heard the speech delivered, and another witness speaks to similar expressions having been used at different times. I do not see what possible motive there could be—none has been suggested at the bar, and I am unable to suggest to myself any possible motive for that declaration. If, indeed, there was no foundation for it, of course, in addition to the objection of its being a falsehood, it was a gratuitous slur upon the title of the agent's employer; because, if there was no objection known to him to the plaintiff's title, one cannot conceive anything more absurd, or more injurious to the plaintiff's interest, than his agent proclaiming that there was an objection, although nobody was likely to find it out. On the other hand, if he was possessed of the secret and nobody else knew it, one cannot conceive any folly greater than to say at a meeting of five hundred persons that there was an objection to the title, leaving all those persons to find it out; an objection which might probably become known to those who might be affected, one way or another, by the failure of the plaintiff's title. However there is no distinct evidence of this having been used as a means of obtaining the deed, though there are strong suspicions that it might have been.

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Now all these circumstances, although not amounting to positive proof of fraud, yet are so full of suspicion, that, considering the situation in which the parties stood towards each other, considering the haste with which the deed was prepared and executed, and considering what was stated to have passed, I think, if the transactions had been complained of within a reasonable time, no Court of Equity could have hesitated in setting aside these transactions, unless a very different explanation had been given of them than that which has been afforded in this suit. But, however, it must be observed that there is no positive evidence of fraud, no distinct evidence of misrepresentation or of influence used by the possession of the secret, although there is very strong suspicion that each of these acts might have been brought to bear as means of obtaining the deed in question. All those facts, however, were of course known or might have been known to the plaintiff himself, and that, which appears extremely suspicious upon the face of the transactions as they stand, might have been capable of explanation, or there might have been a knowledge of circumstances which would lead those, who were acquainted with all the facts, to a different conclusion from that to which they might have been led by the mere circumstances of suspicion to which I have alluded. For instance, the plaintiff must have known whether the supposed secret as to his title was or was not used as a means by which the deed of 1829 was obtained. He knew or had the means of knowing, or those whom he employed had the means of knowing, what was the state of the account between the father and Mr. *Devereux*; and if they did not think proper to use those means in their power, those that suffer by their negligence ought not to be heard to complain.

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The subsequent transactions are of a character which seem to me to render it perfectly impossible for a Court of Equity to open the transaction of 1829, if there be such a doctrine in a Court of Equity as that confirmation will make that valid which in its origin was voidable, though not void, upon grounds for equitable interference. This deed, executed in 1829, operates beyond all doubt, as long as it stands, as a conclusive settlement of accounts. Whether those accounts were investigated or not, is not material for the purpose, because the deed, so long as it stands, is a conclusion of all question of account anterior to the death of the father. Such are the terms of it. It appears that so early as the month of *October* 1830,—whether upon the application of the plaintiff, or whether by desire of the defendant, is matter of some doubt upon the evidence,—there was a negotiation going on between the defendant and the then solicitors of the plaintiff. The plaintiff was then represented by Messrs. *Montgomery & Aiken*; Mr. *Maher*, being the partner of the defendant, was the party negotiating on his part, and *Montgomery & Aiken* were the parties negotiating on the part of the plaintiff. It appears that this was not done in haste. There was ample opportunity afforded of making inquiry into all the circumstances that were material to be inquired into as to the transaction of 1829. It appears that the negotiation commenced on the 5th of *October* 1830, and the first object was an investigation of the accounts between the defendant and the plaintiff. In the first instance it does not appear that the inquiry was confined to accounts subsequent to the death of the father. There was a general inquiry how matters stood between the plaintiff and the defendant; and it is also to be observed that inasmuch

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as the plaintiff was residuary legatee of the testator, any item of account as between the defendant and the testator would be immaterial in a final settlement of accounts between the defendant and the plaintiff, because whatever the defendant owed to the estate of the testator would under the circumstances that have taken place, namely, the plaintiff being residuary legatee of the testator, be an item of account between the plaintiff and the defendant.

Now Mr. *Maher* tells us that in the month of *October* 1830, he, on behalf of the defendant, and Messrs *Montgomery & Aiken* on the part of the plaintiff, came to this investigation of the accounts ; and the letters, which are extremely important, of the 13th of *October* and the 12th of *November* 1830, which have been relied upon in the argument on behalf of the Appellant, appear to me to be extremely important evidence on behalf of the Respondent. Before these is a letter of the 11th of *October*, signed *Samuel Aiken*, one of the parties acting for the plaintiff. He says that Mr. *Maher*, the person acting on behalf of the defendant, "had not been able to come to any conclusion with respect to the accounts." These, no doubt, are the accounts between the plaintiff and the defendant. That leaves it ambiguous, except that the accounts had been the subject of discussion between *Aiken* and *Maher*. Then on the 13th of *October*, the same person writes to the defendant himself a letter, in which, after alluding to another matter with regard to a mortgage, he says, "Bring up with you the conveyance of the *Cooldrina* estate, in which it is said is embodied a general release as between you and the present Mr. *De Montmorency*. I pray of you by no means to omit bringing up this deed, and, in a word, all such other deeds, papers and documents as relate

to the accounts, which I think (as I heretofore mentioned) may be yet amicably and happily settled, on which occasion my honourable, honest, and kind offers shall not be wanting." Now that, of course, must have been done. There is no evidence of its being done, but he asks for information, and we must assume that the deeds relating to the *Cooldrina* estate were produced, which it had become material in the investigation of the accounts between the plaintiff and the defendant should be brought up, in order that Mr. *Aiken*, acting on behalf of the plaintiff, might see how far it was material in that settlement of accounts which he was making on behalf of the plaintiff, and which settlement of accounts necessarily depended upon the state of the accounts between the defendant and the estate of the plaintiff's father. This, therefore, proves that the attention of the legal advisers of the plaintiff was distinctly called to that deed, which deed is material for the present purpose, as it operates as a settlement of accounts up to the death of the father.

It appears from the evidence of Mr. *Montgomery*, that the accounts subsequently investigated were confined to the transactions after the death of the father. It naturally would be so, unless those who were then advising the plaintiff thought that there was a case for setting aside the transaction of 1829, because, from the fact of the transaction of 1829 barring all inquiry as to the antecedent accounts, if they had thought there was a case in which it was the interest of their client to open the accounts antecedent to 1829, then was the time when it was their bounden duty to inquire into the transaction of 1829; and if they thought there was any case which justified them in advising the plaintiff to question those transactions, that was the period when proceedings ought to have

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been instituted for carrying that object into effect. Instead of which, being furnished with a deed that closed the transactions up to the death of the plaintiff's father, his legal advisers, with full knowledge of that deed, proceed to investigate the accounts subsequent to the death of the father, making no inquiry as far as appears, as to the antecedent accounts as between the plaintiff and the defendant. It cannot be supposed that they were so negligent of their duty, or so inattentive to the interests of their client, that they did not inform themselves what was the history of that transaction, and what was the nature of those accounts. It was their bounden duty to do so, and we must presume that they did so. It is due to professional men to suppose that they did attend to the interests of their client, and that they satisfied themselves that what they were doing for their client was what it was for his interest to do.

In the subsequent history of these transactions, Mr. *Montgomery* acting for the plaintiff goes on, and a laborious investigation of the subsequent accounts takes place. He then tells us that finding this extremely troublesome, and that it would occupy a considerable time, he said, "If you strike off 500*l.* from the account, that will leave 2,700*l.* due from the plaintiff to Mr. *Devereux*; that shall be taken as the final balance." That is accepted, and I assume, as there is nothing else to which it could refer, that that is the proposal referred to in a letter written by Mr. *Aiken*, in which he says, "I am authorised to say that as Mr. *Devereux* has agreed not to bring forward or make any charge against Mr. *De Montmorency* for any money transactions or dealings which were had or took place between Mr. *Devereux* and the late Sir *William*, and that same shall be for ever done away

with, that he, Mr. *De Montmorency*, will accede to the arrangement proposed this morning." Whether this refers to that proposition of Mr. *Montgomery* or any other is not material. The subsequent account, it is admitted, on all hands, is not matter of contest in this suit, but a certain sum was agreed upon as the final balance due from the plaintiff to Mr. *Devereux*, upon the assumption that the deed of 1829 operated as a final conclusion between the parties as to all transactions anterior to the death of the father. Accordingly a deed was prepared, and we have the draft; and the draft of the deed, in conformity with that which had been settled, states "that all accounts, of whatsoever nature or kind, heretofore or now pending between them, in relation to any dealings whatsoever, have been and are now finally settled, as well those relating to such dealings or transactions as took place between the said *Hervey Devereux* and Sir *William De Montmorency*, baronet; and that for peace sake, as well as to avoid litigation and expense, the said *William De Montmorency* has agreed to secure to the said *Hervey Devereux* the principal sum of 2,700*l.* in full, for the balance due on said accounts, by two bonds."

This was in *October* 1830, when there had been ample time to review the transactions of the preceding year, when there was no haste in the conclusion of the transaction, when the plaintiff had the advice of the professional persons whose names I have mentioned, when their attention had been drawn to the transaction of 1829; and assuming they were not parties to any conspiracy against their client, which is not suggested, but that they were doing their duty towards the person on whose behalf they were acting, they had deliberately come to a ratification of that which had taken place in the preceding year, and Mr. *Mont-*

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gomery approves of that draft on behalf of his client. He therefore tells his client, by that approval, "I have done my duty towards you, I have investigated all the transactions which concern the accounts between yourself and Mr. *Devereux*,"—which necessarily included the transactions of the period anterior to the death of the father, as well as those subsequent. "I approve of this draft on your behalf, and I, as your legal adviser, sanction your executing that deed,"—which upon the face of it recites a settlement of all accounts, as well those anterior to the death of the father as subsequent.

My Lords, is the transaction actually void in itself? If so, there can be no confirmation of a transaction void in itself. But a transaction voidable only from circumstances of suspicion, however strong, may undoubtedly be confirmed by a subsequent deliberate act of the party, who might originally probably have succeeded in having it declared void. It was subsequently investigated by the party's professional advisers, and with their assistance, and with all due deliberation, he came to the conclusion that it ought to be confirmed, and he does confirm it by deed. That deed contains a confirmation, in terms, of the conveyance of *Cooldrina*. At the same time it must be observed that it is introduced into this deed as an exception from the undertaking to convey other estates. The defendant being trustee of the estates, upon this final settlement with the *cestui que trust*, having claimed security for what he conceived to be due to him, he undertakes to denude himself of the trust, and to put into possession of the legal title that *cestui que trust*, for whom he held the legal estate; and he therefore covenants to convey the estates, excepting that estate of *Cooldrina*, and he agrees to give up the

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deeds, except the deed of *Cooldrina*. It is not therefore foisted into this deed, merely for the purpose of confirmation, but it is a necessary exception out of that covenant which the defendant was called upon to execute when he came to the final settlement between himself and the plaintiff. But there is not only a settlement of the accounts anterior to the father's death, but the conveyance of the estate is now proved to be brought under the attention of the plaintiff's legal advisers, and with their concurrence and with their advice he confirms it.

My Lords, it would be extremely difficult under these circumstances, if nothing more had taken place, unless he had said, "You, Messrs. *Montgomery & Aiken*, have conspired with the defendant, and you have imposed upon me, and induced me to execute this deed in confirmation of a prior transaction,"—if that had been the case he had attempted to make, one could have understood it; but how with the concurrence of Messrs. *Montgomery & Aiken*, how coming forward with them, and employing them as his legal advisers, he can repudiate this deed of 1830 has appeared to me, from the first, to be a matter which involved the plaintiff in a difficulty that was perfectly insurmountable. But there is another circumstance which proves that this was not done behind the back of the plaintiff or without his knowledge and concurrence, but that he was perfectly privy to what was going on, under the immediate direction, no doubt, of his legal advisers, but at the same time communicated to him, and his concurrence asked; and that is, the tenor of the subsequent letters. It is not that any letters subsequently written can add to the validity of a transaction formally entered into, as in that deed of 1830, but the value of these subsequent letters is to show

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that the plaintiff clearly understood what he had done, and that for a considerable time after that period he never questioned the propriety of the transactions into which he had entered. On the 10th of *November* 1831, he is called upon—it being part of the transaction of 1830 that Mr. *Devereux* had brought certain debts to account in his transactions with the testator—he was called upon to show that such investigation of those transactions had taken place as exonerated him from being liable to the payment of those debts. There were certain debts excepted, which he had not taken credit for, and other debts he had taken credit for, and was bound to see to the payment of them. There is another letter of the 16th of *November* 1831, written by himself to the defendant, in terms not of hostility but the contrary, and so far consistent with the case made by the Appellant; and in this letter, which he addresses “Dear *Harvey*,” he states that he has been called upon to pay a debt, and he states, “By the deed executed between you and me you undertook the payment of all debts due of my late father, except certain debts in and on the back of the said deed excepted.” Therefore he tells him that he, *Devereux*, was to be looked to, and not the plaintiff, for the payment of that debt. Now, after this, can it be said that he did not know what he had done, or that knowing what he had done he had no intention of confirming it? The next letter is also undoubtedly open to the observation which has been made upon it; it may have arisen from the continued pressure of Mr. *Devereux* upon the plaintiff, but there is no such thing proved at that time. That letter in terms recognises the transactions, but it also proves this,—indeed it is apparent upon the face of the whole transaction,—that

it was not merely in consideration of the balance supposed to be due at the time of the father's death, but that it was partly on account of the settlement of the accounts, and partly stated to be in consideration of a wish which the plaintiff's father had expressed that he would convey to *Devereux* the estate in question. He says, "Some evil-minded persons have told you that I repented giving you *Cooldrina*. I can assure you I never did say so, nor neither did I ever repent giving it you, and whoever told you so told a great falsehood."

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My Lords, that brings the history of the case down to *October* 1832. Then there is a transaction which has been adverted to, and which is in evidence, of a later date, namely, the transaction of *April* 1833; because here we find the plaintiff and the defendant in opposition to each other. Mr. *Maher*, the partner of Mr. *Devereux*, brings an action for a bill of costs. That is not a very friendly proceeding, and it was not likely therefore that under those circumstances there should be any very kindly feeling between the parties. Nor was it very likely that the plaintiff should be then acting in what he did under any influence of fear as to what the defendant might do with regard to the title of the estate. It might have been a very improper proceeding, and certainly was a very improper proceeding on the part of the plaintiffs in the action, because they were then claiming costs due to them from the plaintiff's father, which had been the subject of arrangement long before, and their title to which they had deliberately relinquished. But who is it that sets up the benefit of the settlement of 1829? The plaintiff himself. He says, "You are calling upon me to pay costs, which costs, by the transaction of 1829, you have waived all title to."

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He is the party who in 1833 was claiming the benefit of this arrangement. Whatever ambiguity there may be in the language of Mr. *Maher's* deposition, the result, as I understand it, is, that the plaintiff, then defendant, set up this defence and got the benefit of this defence, and he was accordingly protected from all costs incurred in the lifetime of his father, and due from the father to Mr. *Devereux* and Mr. *Maher*.

Whatever costs there might be due to Mr. *Maher* individually is not the subject of the claim of Mr. *Devereux*, but so far as regarded the costs due to the partnership of *Devereux* and *Maher*, the plaintiff got the benefit of that defence. Having set up the arrangement of 1829, which he now impeaches, he got the benefit of it, and was relieved from the costs incurred in the lifetime of his father. That took place in 1832, and nothing more is heard of this complaint of the transaction of 1829, until a bill is filed in 1835.

My Lords, having gone through the history of this transaction, and shortly called your attention to the periods at which the circumstances of the case must have been matter of investigation by the plaintiff, and the mode in which upon those occasions he has dealt with those facts, showing that from 1829, in every subsequent transaction, he has recognised what had then taken place, that he has confirmed and acted upon it in the years 1831, 1832, and 1833, and never complained of it till 1835; it appears to me, that although the transaction was questionable in its origin and suspicious in its commencement, it is not now capable of being complained of, and that therefore it will be the duty of your Lordships to confirm the decision of the Court below.

The Court below dismissed the bill without costs, and I think it did so rightly; because, however trans-

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actions may be confirmed, if they have their origin in circumstances so suspicious, as between a client and a solicitor, as these transactions were in their origin, I think that if the solicitor or agent ultimately escapes, by confirmation on the part of his client, in preventing these transactions from being entirely set aside, he never can complain of being put to the cost of having them investigated. The same ground therefore which induces me to think that the Court below did rightly in dismissing the bill without costs, induces me to submit to your Lordships that this decree should be affirmed, but that it should be affirmed without costs.

There is one other part of the case to which I wish to call the attention of the counsel for the Appellant, which is to that letter undertaking to pay a salary of 200*l.* a year. It does not appear that that now is of any value to the parties. Whatever, therefore, your Lordships may think right to do with reference to that letter, would not make any difference as to the costs. At the same time, it is a contract which under these circumstances undoubtedly ought never to have been taken. It appears to have been left in the hands of Mr. *Devereux*; and if the plaintiff therefore requires it, I will submit to your Lordships that the decree should direct the document to be delivered up; it can make no difference as to the costs below, or as to the costs here.

Lord *Wynford*:—My noble and learned friend has gone so fully into this case, that it is scarcely necessary for me to say more than that I concur with him. I will, however, trouble your Lordships with one or two observations. There is no dispute here as to any question of law; there is no doubt that the transaction did not render the deed altogether void, but merely

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voidable, and being voidable, it may certainly be confirmed by what took place afterwards. If the deed of 1829 was executed (which probably there may be some reason to suspect) under the supposition that the defendant was in possession of some secret which he might use for the purpose of defeating the plaintiff's title to the estate, a fear of that sort arising from a threat on the part of the defendant would invalidate any transaction that took place under the influence of that fear. I would state, however, that there is no evidence of any threat on the part of the defendant to make use of any knowledge which he might possess for the purpose of injuring the plaintiff. On the contrary, it is admitted on all sides that, although it is said by some of the witnesses that he boasted that he was in possession of this secret, he uniformly said that he would keep it within his own breast, and that he would never use it to injure the plaintiff.

My noble and learned friend has stated that upon another occasion, besides what took place at the bonfire meeting, he alluded to this secret. What he said at the bonfire meeting is, as it is represented on the part of the plaintiff, very extraordinary, and it is scarcely possible to believe that it can be true. It is material to observe that the defendant gives a very different account of what he said at the bonfire meeting. On the part of the plaintiff it is stated that the defendant said he could at any time, by disclosing the secret, defeat the plaintiff's title. What could possibly have induced him to say any such thing one cannot conceive, but according to his own account, what he did say is very different from what he is represented to have said by the evidence given on the part of the plaintiff; for he states in his answer, that what he did say was, that it would be useless for my Lord Crofton

to bring forward his claim as heir-at-law, as he was in a condition to disprove that claim. Now, if he said that, certainly it was sufficient to produce the effect which he says he intended to produce, to prevail upon the tenants of this estate not to be frightened at any claim set up by Lord *Crofton*. But notwithstanding this, unquestionably what my noble and learned friend has said is very true, that on the very day of the funeral of Sir *William De Montmorency*, something, at least very indelicate, was said on the part of the plaintiff, if not exciting very great suspicion in this affair, of his endeavouring to get possession of this estate conveyed to him, and also as himself being the attorney who was to prepare the deed himself, and writing that very extraordinary letter by which 200*l.* a year was to be secured to himself: and I quite agree with my noble and learned friend, that if proceedings had been instituted to set aside this deed, the deed which followed upon that letter, it seems to me impossible that that deed, or that that letter securing the 200*l.* a year, could possibly have stood; therefore, I say, if the transaction had ended with the deed executed in 1829, it appears to me it could have been set aside.

But the question is, has that deed, which was only voidable, been confirmed by that which has subsequently occurred? Now the deed of 1830 is certainly a direct confirmation of it, as strong a confirmation as it is possible to be. In that deed it is stipulated that all securities belonging to Sir *William's* property should be delivered up, except the deeds relating to the estate of *Cooldrina*. Why were they not delivered up? Because the estate of *Cooldrina*, by the deed of 1829, had been conveyed by the plaintiff to the defendant. It would, therefore, have been improper to deliver up

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those deeds, because those deeds were the muniments of the property which had by the previous transaction, so confirmed by this, become the property of the plaintiff. But this is not all: then follow two letters in 1831 and 1832, and the subsequent transaction in 1833. By the first of those letters he claims to take advantage of this very deed which he now attempts to set aside: and then in the second letter, in 1832, he says he never, since the execution of the deed of 1829, had said one word to the effect that that deed had been improperly obtained, quite the contrary; he never thought of it, and that that man must have spoken falsely who had ever conveyed to the mind of the defendant the idea that he ever thought that deed void. Now it strikes me that, supposing an undue impression to be created in a man's mind, it is often difficult to prove the precise time when that improper impression was got rid of. But a circumstance had taken place before the writing of either of these letters, which clearly showed that impression must have been got rid of before that time. Both these parties were desirous of putting an end to the connexion with regard to the agency of the estates. Now if that impression had continued in the mind of the plaintiff that the defendant was in a condition to take that estate from him, or to enable any one to take that estate from him, whenever he thought proper, would he not upon any terms whatever have kept this person still in his employment? But it appears that the one was desirous of quitting the employment, and that the employer was desirous of getting rid of him. Now this clearly shows that all fear on the part of the plaintiff must have been got rid of at that time: yet after this he writes the two letters, which your Lordships have heard: therefore, whatever suspicion there may be

with respect to that which took place in 1830, as to the continuance of this fear as to the title to the estate, it is clear that that impression must have been got rid of before the writing of either of the letters in 1831 or 1832, for before either of those letters were written all connexion whatever had been terminated between the plaintiff and the defendant.

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But I must say, with respect to the deed of 1830, it seems to me that if that deed were to be set aside, as was very properly said by one of the counsel at the bar, I do not know what deed is to stand. There is no particular error pointed out; matters were investigated before this deed was executed. There was no want of legal assistance; it seems to me, on the contrary, that if there was anything to complain of, there were rather too many present. There was a great number of attornies present; some concerned for one party, and some concerned for another; and it is positively sworn, that all parts of the transaction were minutely and thoroughly investigated before the deed was executed. It appears to me that if this were to be set aside, no transactions which take place between man and man could be considered as final, but parties must be for ever exposed to have transactions ripped up in a Court of Equity, if these accounts are not to be considered as closed under this agreement, which took place in 1829. I therefore agree with my noble and learned friend that the decree of the Lord Chancellor of *Ireland*, in every part, ought to be affirmed. It is undoubtedly the practice, that when an appeal is made against a decree, and the judgment of the Court below is affirmed, that appeal ought to be dismissed with costs. But I think, with my noble and learned friend, that this case forms an exception to that general rule; that there is so much to blame in

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the conduct of the defendant in the beginning and up to the year 1830, that the plaintiff was lawfully justified in appealing to the Court of Chancery in *Ireland*, and even in coming to this House to have the matter thoroughly investigated. Under these circumstances it appears to me that it would be hard and unjust to visit such a plaintiff, who is acting under such circumstances, with costs. I therefore concur in thinking that this appeal should be dismissed, without costs.

With respect to that instrument to which reference has been made, undoubtedly it ought to be given up, though it was distinctly stated, as I understood, on both sides at the bar, that that instrument—wretched instrument as it is—was not intended to be carried into execution. I am glad that the party had so much modesty and moderation as never to attempt to carry it into execution. It never has been executed. Nothing has been attempted to be obtained upon it, but the party is afraid that there may be bounds to that moderation, and that the period may come when he may be in danger of being called upon for the payment of that sum of 200*l.* per annum; and it is certainly extremely proper that he should have full security against any danger of that sort.

The *Lord Chancellor* :—The decree will be varied by directing the letter of *April* 1829 to be delivered up to the Appellant, and that in all other respects the decree be affirmed, without costs.

Ordered accordingly.

ADAM GIBSON, late Teacher of Latin }
and other Languages in the Royal } *Appellant.*
Academy of *Tain* - - - - - }

1840:
March 2.

HUGH ROSS, Esq., *Preses*, and Others, }
the MANAGERS and DIRECTORS of the } *Respondents.*
said ACADEMY - - - - - }

THE rules of law applicable to the managers of a public establishment, do not apply to one formed and maintained from private funds, though it may be formed and maintained under a royal charter of incorporation.

*Corporation
School.*

The appointment to an office in a private establishment is not, therefore, necessarily an appointment *ad vitam aut culpam*, but depends in each instance on the particular circumstances under which it was made.



THE Respondents were the managers or directors of the academy of *Tain*, in *Ross-shire*, an institution established and supported by private contribution; and the question at issue regarded the right or power of the Respondents, as directors, to remove one of the teachers of the name of *Gibson* (the Appellant).

The want of any preparatory institution for purposes of education, had formerly occasioned much inconvenience in the north of *Scotland*. Hence, the plan of an academy at *Tain* was projected, and at once met with the highest encouragement. A leading part, in originating and carrying through the measure, was taken by Lord *Seaforth* and Lord *Reay*; and these noblemen were cordially supported by the most opulent and influential classes of the community. Subscriptions, to a considerable amount, were speedily obtained; a large plot of ground was gratuitously presented to the promoters of the scheme;

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and in *May* 1809, a royal charter was obtained, embodying the managers or directors into a corporation, with a right of perpetuity and succession, and all the customary legal privileges incident to a society so constituted.

Throughout the district of country which was expected to be benefited by this institution, there were regular parochial schools, and in the towns burghal schools, or, as they are called, grammar schools; being all public institutions of ancient standing, subject to special rules, and governed, in their whole economy, by the statute and common law of the land.

The charter declares the object and purposes of the society to be the foundation and endowment of an academy for the instruction of youth within the burgh of *Tain*; and it proceeds to constitute and incorporate certain individuals and heads of public bodies, to the number of 21, with 13 persons to be elected, besides every subscriber to the amount of 50*l.*, and the heir-male of subscribers to the amount of 100*l.*, into one body, politic or corporate, by the name and title of the “Managers and Directors of the *Tain* Academy,” who are empowered to conduct the whole business and affairs of the institution.

By this name and title, those persons are empowered to buy, take, hold and enjoy lands, tenements and hereditaments, goods, chattels, donations and legacies, to sue, plead and defend, and to be sued, impleaded and defended in any Courts of Justice; and farther, “to appoint treasurers, stewards, factors, cashiers, and other necessary officers, for them to act, and to have and use a common seal, and the same to change from time to time, as shall seem expedient to the said incorporation; and otherwise, and in all other things, to act and do as is permitted by law, and as is

usual in the case of persons incorporated, and with all the privileges incident to such incorporations."

There is a power of making bye-laws, given by a clause which confers on the subscribers, being members of the corporation, and their successors, "full power to make such other and so many bye-laws, regulations, rules and orders, as they, or the majority of them present at such meetings, shall judge proper and think necessary for the better government and direction of the said academy. And the said regulations hereinabove recited, as well as the bye-laws, regulations, rules and orders to be made in future, or any of them, to alter and annul, as they the members of the said incorporation so assembled, or the major part of them present, shall deem proper and requisite: provided always, that when any new bye-law, or any alteration in any of the then existing bye-laws, shall be intended to be made at any such annual meeting as aforesaid, notice of such intention shall be inserted in one or more of the *London* evening newspapers, and in one or more of the *Edinburgh* newspapers, one month at the least previous to the day of such meeting. And we will and direct that all bye-laws, regulations, rules and orders, made as aforesaid, shall, until altered, be duly observed and kept, provided that the same are noways contrary to the laws of the realm, and the general purport and meaning of our said charter and letters patent."

The charter bears date in 1809, and the first advertisement for teachers was published in the newspapers in *August* 1812. The advertisement set forth, generally, the nature of the new establishment, as having been erected by private contributions. "A royal charter (it was stated) was obtained, constituting the directors of the academy a body corporate,

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with power to appoint all the teachers, and to enact bye-laws, for the internal regulation of the academy.”

Various persons came forward and offered themselves as candidates for the different situations of teachers in the academy. But, in the meantime, some alterations were judged necessary by the directors to be made upon the rules introduced by the charter, and some additional provisions as to the hours of attendance, school fees, and periodical examinations, and other such matters not referred to in the charter. Accordingly a draft of these bye-laws and regulations was produced to a meeting of the directors, held on the 13th of *October* 1812, and considered by them. The directors approved of them as they stood, and adopted them as interim regulations, but referred the question as to their final adoption to a general meeting to be held in *April*.

The first of these proposed bye-laws declared that “in the election of teachers, the directors are to be guided by a regard to the character and abilities of the candidates, as certified by the testimonials of competent and respectable judges; and for this purpose, the directors shall, if they think it necessary, request some of the professors of any of the *Scottish* Universities to examine the candidates, and report their judgment of their respective qualifications.”

In conducting the election, the directors determined, in the first place, merely to designate by ballot such persons as should be approved of, but to make their election dependent on the result of an examination or trial to be undergone by them, in presence of Principal *Baird* and two professors of the University of *Edinburgh*, and also on their express agreement to be bound by the charter and bye-laws.

Accordingly, the teachers being balloted for at the general meeting of the directors, which was held on

the 16th *December* 1812, the Appellant was, on that occasion, chosen among others. The same meeting took into consideration the proposed bye-laws which had been previously adopted *ad interim*, and in which certain alterations were then made: but with these alterations they were declared to be the fixed rules and regulations for the government and management of the institution, and it was expressly provided that the different teachers should be subject to them. Accordingly the minutes, after setting forth the election of the different teachers, and among others, that of the Appellant, proceed as follows:—“ The meeting request of their secretary to inform the different gentlemen above mentioned, of their election by this meeting, and to direct them to proceed forthwith to *Edinburgh*, for the purpose of their undergoing an examination of their knowledge and abilities by the professors of the College there; and also to inform them that, if found qualified, they are severally to enter on the duties of their office, against the 15th day of *February* next; in which event they are hereby found entitled to all the fees and emoluments of their different situations respectively, as the same are fixed by the directors and hereinafter inserted; but subject always to the rules and regulations adopted by the directors for the government and management of the institution, as well as the bye-laws which the directors have laid down for the internal regulation of the institution.”

The following stood as the second of these rules:—
“ In case it shall be found necessary to discontinue any of the teachers, which can only be done by a special meeting of the directors regularly called for the purpose by their preses for the time being, it is understood and declared that such teacher shall receive three

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months previous notice of such intention, before his services are declared at an end; and in the event of any of the teachers wishing to leave the institution of his own accord, such teacher shall be obliged to give three months previous notice to the preses of the directors."

In like manner, by the 7th regulation, it was provided,—“That if any of the teachers shall be found, after due inquiry by the directors, to be unsuccessful or, in other respects, unworthy of the trust reposed in him, it shall be always competent to the directors to deprive such a teacher of his office, and of all the emoluments connected with it.”

The academy was formally opened on the 15th *February* 1813, at a general meeting of the directors, attended by a number of the subscribers, and at which all the persons elected teachers, and among the rest the Appellant, were present, having successfully gone through the trial at *Edinburgh*. The preses of the meeting then stated to them the different bye-laws and regulations, “which the managers and directors had, in the meantime, thought it necessary to make for their regulation and government. That if they thought it proper, the clerk would furnish them with copies of what they might require, which they might consider at leisure, until the general meeting upon the 30th day of *April* next; and if they thought anything could be altered or added, for the better government of the academy, the meeting of that day would consider of it, and would do in the matter as they saw cause.”

Copies of the proposed bye-laws, including the articles above quoted, were then, at their special request, furnished to the teachers, and were fully and maturely considered by them. The result of their deliberations was communicated to the directors in a long

letter, in which they commented upon several of the laws, but passed over article 2d, in regard to the dismissal of teachers, without any observation or notice whatever.

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The final meeting of subscribers was held on the 30th of *April* 1813, when “the letter of the teachers was considered, and the subscribers, in general meeting assembled, having carefully gone over the same, with the rector and masters’ remarks, they have unanimously adopted the following regulations, which they direct and appoint to be the standing regulations of the *Tain* Royal Academy, until cause shall be shown to any future general meeting for any alteration.”

Among these regulations, the rule above quoted as article 2d, was sanctioned and universally agreed to, without the alteration of a word.

The Appellant did not appear to have been successful in his teaching; and in 1834 a number of heads of families and leading people in *Tain* and its vicinity united together, and invited a young man, qualified to teach Latin and French, to settle with that view in *Tain*, engaging, besides the school fees, to contribute such a sum among themselves as, upon the whole, would ensure him a respectable income.

The Appellant’s school suffered severely from this circumstance. The committee who examined the school in *July* 1834, after mentioning the appearance of the scholars under examination, made the following statement:—“The committee cannot, however, close their report without expressing their deep regret at finding no more than four scholars in the Latin department.” This number was afterwards withdrawn, and for several sessions past the Appellant had not been attended by one single scholar.

The directors met again on the 20th *November*

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1834, and their minutes of that date contain the following entry:—"The directors find, with much regret, that the classical department under charge of Mr. *Gibson* is entirely deserted; not a single pupil has been this session entrusted to him, in any one of the various languages which it belongs to him to teach. As the guardians of the institution, they cannot permit this state of matters to continue longer. The directors conclude that the desertion of his classes is in consequence of Mr. *Gibson* having lost the confidence of the public; for in the immediate neighbourhood of his class-room, Mr. *Mackenzie* of *Inverness* has recently opened a school for Latin and the other learned languages; and with nothing but his character, talents and industry to recommend him, is very numerously attended. To prevent the destruction of the class, by continuing an individual whose very incumbency prevents the attendance of even a single pupil, the directors consider it their duty to recommend to their preses to call a meeting, in terms of the charter and bye-laws, to consider whether Mr. *Gibson's* services shall be dispensed with; and do so accordingly."

Accordingly, that meeting was held on the 28th *August* 1835, and ended in an unanimous resolution dismissing the Appellant from the institution.

Against that resolution the Appellant complained by bill of suspension, and maintained that he held his office, like that of a parochial or burghal schoolmaster, *ad vitam aut culpam*, and could not be removed, unless for sufficient and relevant cause duly proved against him.

The Respondents contended, upon the terms of the charter and bye-laws, to which the Appellant and all the teachers were parties, and by which they had

bound themselves, that the Appellant was removable at pleasure, and that the directors had the full power to dismiss him when they should judge that measure necessary.

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On the 28th *December* 1835, Lord *Balgray* pronounced an interlocutor, refusing the bill and recalling the interdict; reserving, however, the right of the Appellant to claim from the Respondents any arrears of salary to which he might be advised that he was entitled.

The Appellant then presented a second bill, which, on being advised with answers, was dismissed by Lord *Cockburn*, with a note, declaring that the Lord Ordinary was of opinion that the Respondents had power to terminate their connexion with the suspender, and that they exercised this power regularly.

The Appellant reclaimed to the Court against the above judgment, and then brought forward the objection that, according to the terms of the charter, the manner of proceeding adopted by the directors was irregular. On this objection the Lords recalled the interlocutor, and remitted to the Lord Ordinary to pass the bill.

The bill was accordingly passed, and the case brought into Court in the ordinary form. It came before Lord *Jeffrey* as Ordinary; and his Lordship sustained the technical objections, holding the proceedings to be irregular.

The Respondents, in anticipation of this result, called other meetings, and proceeded step by step in the most regular manner. The last of these meetings took place on the 10th of *August* 1837, when the Appellant was in form dismissed.

Against this sentence of dismissal the Appellant again complained to the Court of Session by bill of

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suspension, which came before Lord *Jeffrey*, as Lord Ordinary, by whom it was reported for the opinion of the Inner House; and on the 22d of *December* 1837 the Lords there pronounced a judgment recalling the interdict, and sustaining the right of the directors to dismiss the master of the academy. This was the judgment now brought before the House on appeal.

The *Lord Advocate* (*Rutherford*), for the Appellant:—There have been two dismissals in consequence of the resolution of 1835, which were stopped as being contrary to law. Then there was one in 1837, the objection to which is that it was one made after an interdict. These dismissals cannot be sustained. The Court below was not unanimous in the decision in favour of the Respondents. Lord *Jeffrey* and the Lord Justice Clerk both thought that inquiry was necessary previous to dismissal. The question is whether the directors of an institution of this kind, being a voluntary one, have a right to remove from his office a master who has been once lawfully appointed; in other words, whether such an office is for life or only during pleasure. It is clear that the office was not one held during pleasure; it is a burgh school, instituted for the benefit of the burgh. The *Magistrates of Montrose v. Strahan* (a) laid down the doctrine that the being admitted to a school simply, and not expressly during pleasure nor *ad vitam*, gives to the person admitted a right to his office for life or until fault proved against him. A similar doctrine was adopted in the case of *Kempt v. The Magistrates of Irvine* (b). There it was held that where a person had been admitted to an office,

(a) Morr. 13118.

(b) Morr. 13136; and see the case of *Hastie*, Morr. 13132.

and served for several years though originally elected for one year only, he could not afterwards be removed arbitrarily, or without just cause assigned and proved. —[The *Lord Chancellor*: What schools were they?]
—They may be considered as endowed schools. But that fact makes no difference in the case. The feeling of the law is so strong in favour of making an office to be held for life, that where the original appointment is for one year only, if the party serves for several years his office becomes held by him on a life tenure. That principle was adopted in this House in the case of the town-clerk of *Annan*. Then comes the case of the directors of the school of *Ayr* (c), where it was distinctly held in a case of this sort that a cause of dismissal must be shown. In that case a cause of dismissal was shown, and the dismissal was therefore held to be good. The case of the directors of the *Inverness* school (d) is even more in point. This is not a voluntary association, but is one that exists under a charter. The trustees have, it is true, a right to dismiss the master, but they must do so on a proper ground. How can the dismissal in this case be supported, while the decisions already referred to stand unquestioned? In *Mason v. Scott* (e) the Court admitted the right as it was exercised here, but that was because that particular school was entirely a private school. That is not the case here, and these directors are therefore bound to show a valid necessity for the discontinuance of the teacher. The *Inverness* case says, “on a proper ground:” here the word “necessity” is used, but the expressions mean the same thing. The grounds of the dismissal must be stated. If the directors contend that they may under

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(c) 4 Shaw & D. 63.

(d) 14 Shaw & D. 714 n.

(e) Fac. Coll. 23 Jan. 1836.

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their bye-laws dismiss the master at pleasure, their claim is contrary to the laws of *Scotland*, and they cannot pass any law or regulation giving to themselves such an illegal power. But supposing that they have the power to pass such a law, then it is submitted that the law passed in this case is null and void, as it was passed without the required notice; no advertisements, such as are required by the law, having been published. The interlocutor must be reversed. It ought to have passed the bill, in order that there might be a full inquiry in the Court below.

Mr. *Anderson*, on the same side:—The trustees here claim an arbitrary power, which it is clear the law will not concede to them.—[The *Lord Chancellor*: Suppose that there had been no charter in this case, but it had been a mere private school, could not the trustees have dismissed the master? And if so, does the mere act of incorporation make this difference in the rights of the parties?].—In a private school the dismissal might possibly take place. Such a school would be endowed by private individuals from their private funds, and they might regulate the provision they would give the master, and the conditions under which he was to receive it. But that is a thing totally different from a public school, where the public have an interest, and where they have to examine into the administration of the foundation funds. The school here is a public school. It is established for a great public purpose, and the managers and directors of it have had their powers conferred on them by the subscribers for the purpose of promoting the object of the public utility, which was the cause of the creation of the institution. If there is not this difference between strictly

private establishments and institutions of a different kind, even borough and parish schools would be made subject to the caprice of the trustees. The numerous cases on this subject have settled that that course shall not be applicable to them.—[The *Lord Chancellor*: Have you any case in which the line has been drawn between those privately endowed schools which have been incorporated, and those which have not been incorporated?—There is no case of that kind, unless the contest between the case of *Mason v. Scott*, and the *Inverness* case, can be considered as establishing that line of distinction.—[The *Lord Chancellor*: The question depends entirely on the terms of the charter. In that case there had been certain conditions established, by which the right to dismiss was restricted to a case where there were proper grounds.]—The principle is clear, but was not carried out in *Mason v. Scott*, simply because that case was one of a merely private school.

The *Attorney-general* and Sir *W. Follett* appeared for the Respondents, but were not called on to argue the case.

The *Lord Chancellor* :—My Lords, I should be inclined to take that course which would enable the parties to go on with the suit, if I thought that I could properly do so. But if your Lordships have no doubt, on the Appellant's own statement, that the Court below has come to a correct conclusion, it would be an injustice to permit the parties to engage in further litigation. This case is that of an appointment to the mastership of a school, and of the right claimed by the school trustees to dismiss from that appointment. Certain individuals who had determined on establishing a school, having met together, thought it would be

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for the advantage of the object they had in view, that they should obtain a charter of incorporation for themselves and for those who might afterwards come in their place. But the whole matter was of a private nature. Its object was to provide funds, and those were to be considered members of this voluntary body, incorporated by the Crown, who should contribute to the support of the school. It has been decided that where individuals establish a school, to be maintained from private funds, the regulations under which public schools are conducted, are not to be deemed applicable to them. A public schoolmaster is a public officer, and as such he cannot be dismissed without an assigned and sufficient cause. But it is clear that in the case of a private trust this rule does not apply. That is a clear and well-settled principle of law. Then arises another question, namely, one relating to the effect of an incorporation. I asked, in the course of the argument, whether there was any line of distinction drawn between the case of a private establishment, the members of which had been incorporated, and a case in which no such incorporation had taken place; and I could not find that any such distinction had ever been adopted. If so, then I am sure that your Lordships would not for the first time introduce such a distinction: nothing could more disturb the arrangements of a private establishment than that a subordinate officer in it should be considered to have a fee in his office. It is incumbent on a person who claims such an advantage, to show that it properly belongs to him. Now there are many cases in which it would be highly inexpedient for the interest of a body like these trustees that a man should continue in his situation, though it might be difficult to show a legal ground for his removal. He may be

unsuccessful in the discharge of his duties; he may have great abilities, but yet be unable effectually to exert them in the instruction of his pupils. This might be a great evil to an institution of this nature, and yet it might not amount to a cause which in a Court of Justice would justify the dismissal of the master. At the same time it must be admitted that the circumstance I have mentioned would form a good ground for desiring the master's dismissal. But the same rules are not established in private as in public schools, and there is no case to show that the mere incorporation of the trustees of a private establishment subjects them to the same rules as those which affect public establishments. It is now material to refer to this charter; for your Lordships may be of opinion that it is not necessary to establish a general rule, but that the case may be determined on the words of this particular charter. What then are these words? The power given to these trustees is very large. They are to have a common seal, and full power to appoint their successors. So far from the charter limiting the power of the corporation, the trustees have the most unlimited discretion vested in them to make rules and regulations for the better government of the academy.—[The Lord Chancellor here referred to the terms of the charter; see p. 242-3, *supra*.]—The powers given to them are therefore as ample as language can convey. It appears too that the Appellant was aware of these powers; for there had been previously communicated to him certain minutes of the directors, of the 16th of *December* 1812, and amongst others he was informed of the bye-laws which they had framed for the regulation of the school.—[Here his Lordship referred to the bye-laws, and to the notification of them given to the teachers on their election.]

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These were communicated to the present Appellant previous to his acceptance of office. It seems to me to be immaterial, these facts being established, to inquire whether the bye-laws were advertised in the papers or not, for he accepted office under the terms of the proposed law which was afterwards regularly enacted on the 30th of *April*. When it is found that the charter itself left the managers of this institution at liberty to make such laws as they might think fit, and when it is found that by the laws they have made they have limited the powers which the charter gave them,—that they have confined their own powers as to the discontinuance from employment of any of the teachers to cases where they may think such discontinuance necessary, which opinion of necessity is to be declared under certain circumstances and in a certain manner,—I cannot find a ground for saying that they have exceeded the limits of the authority which they lawfully possess. This act of the trustees, indeed, gives a protection to those who may happen to be appointed, who can only be discontinued on notice, and on a meeting being held to regulate the proceedings for that purpose, and if it should be found necessary: found necessary for what? Is it possible that any other persons could have a right to judge of this necessity but those who made the appointment and settled the rules under which it should be held? We cannot doubt that the law would enable them to give judgment on that. It was originally introduced for that purpose, and the observations of Lord *Jeffrey* apply to that matter. Remarking on the difference between the interim law of the 16th *December* 1812, and that which was finally adopted on the 30th of *April* following, he says, “in the former it is provided that a teacher may be removed, not only if found *on inquiry* by the

directors to be *unworthy of trust*, but also if he be *unsuccessful*; whereas in the latter he is only to be dealt with *in case it shall be found necessary*." The language varies, but the sense is the same. It is by law part of the contract between the directors and the master, and is in fact a restriction on the power which the directors have a right to exercise. Under these circumstances the teacher becomes a teacher in this academy; and at a meeting regularly convened, the directors determined, in a way into which your Lordships cannot now inquire, that the services of Mr. *Gibson* should be discontinued. If they had the legal right to do that, your Lordships cannot interfere with their exercise of that right. There are in the case circumstances stated which appear to be matters of hardship on the Appellant; but they are only part of the narrative of the case, for there is no evidence of them laid before you. The question now simply is whether the right which the directors claimed to exercise at the regular meeting of this body, was a right which they had authority to exercise? The case does not in my mind show any ground to doubt that they had this legal authority. It is clearly established that a private society would have the right to dismiss a master, and there is no difference here between these parties and any other private society, except that these parties are incorporated. If the charter of incorporation imposes any restrictions on them, they would by the acceptance of it be considered to enter into a contract with the Crown to exercise their authority subject to those restrictions. That was the *Inverness* case(*f*), in which it was held that the party could not be dismissed without a good reason being given for his dismissal.

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(*f*) 14 Shaw & D. 714 n.

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The case there showed what was the reason assigned. Then in a case of that kind there must be some jurisdiction to determine whether the reasons on which they acted were valid or not. But here that is not so, for the trustees have reserved to themselves an unqualified power of judging of the necessity, and the Appellant has accepted the office acquainted with and assenting to that reservation.

The cases of parish schools seem to be admitted to have no application to the present. It is said indeed that this must be considered as a public school, because it has been incorporated. But, as it seems to me, the mere fact of the incorporation by charter does not distinguish this institution from a private school. The *Inverness* case is the only one which is supposed to have any application to the present; but there the charter expressly limited the powers of the persons whom it incorporated. In consequence of the restrictions there imposed, the Court of Session said that that Court must judge of the exercise of the powers of the trustees, and of the reasons given for the exercise of those powers in any particular case. No such restriction exists here, and consequently no such reason for the interference of the Court can be alleged. Though there is not any case exactly in point with the present, yet the *Ayr* case^(g) is in some respects similar. In that case there was an incorporation, and there certain rules were laid down under which the directors were at liberty to dismiss the master. Certain rules had also been laid down with respect to his appointment. One great question in that case was, whether the master who had been secondly appointed, came into office under the same terms as those which had regulated the appointment of his predecessor; and it was considered

(g) 4 Shaw & D. 63.

that he did so. In that school the duties of the master were so far of a public nature that it was held not competent for those who had the management of the school to alter the tenure of the master's office, and to confer it only during pleasure. It was held there that cause must be shown for the dismissal, but that, independently of that, the master there came in under the conditions which had been imposed on his predecessor. According to the rule in several of these cases, the directors could not put this restriction on him, if the office was a public office. But I think it cannot be said here to be a public office. The mere fact of the incorporation of the subscribers does not give it that character. Then the case of *Mason v. Scott* having established that, in a private charity, the rules applicable to a public establishment should not be applied; and there being here nothing but an act of incorporation, which, in my opinion, does not make any difference in the nature of the institution; and there being no case stated to induce your Lordships to doubt that the directors had, by the constitution of this school, the right to dismiss the master,—I cannot advise you in favour of the present appeal. Three of the Judges at the time of the argument, one of them being the Lord President, thought that this bill ought to be permitted to be passed; but they did not express any decided opinion on the ultimate merits of the case. The Lord President proceeded on what had taken place before; but that does not appear to me to be a legal ground for decision. There had been considerable error in the former proceedings. The question now is, whether what was done by the trustees was rightly done. From the fact of the earlier proceedings having been founded in error, there does not appear to me any ground on which the Court

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ought to take them into consideration. It is, therefore, unnecessary that your Lordships' time should be occupied further with this discussion, unless the Respondents should ask for liberty to say something on the subject of costs. As advised at present, I should say that the judgment of the Court below ought to be affirmed, but not with costs.

Sir *W. Follett*, on the part of the Respondents, disclaimed any wish to address the House on the subject of costs.

The appeal was then dismissed, and the interlocutor complained of was affirmed, without costs.

JOHN REID - - - - - *Appellant.*

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ISAAC BAXTER and Others - - *Respondents (a).*

A PERSON labouring under great defectiveness of vision, though not absolutely incapable of writing, may, if he pleases, execute a deed by the intervention of notaries, and such execution will be good under the *Scotch* Acts of 1540 and 1579.

Deeds,
Erecution of.

THIS was a summons for reduction of a trust-disposition and settlement, and two codicils thereto, executed by the Appellant's father, in the following manner:—
“ At the special request of the within-designed *John Reid*, who, from a defect of sight, or dimness of vision, cannot see to read or write clearly, as he asserts, and being desirous to execute the foregoing deed in a valid form, so as to exclude challenges on the head of blindness or defect of sight; therefore we, *John Drysdale* and *James M'Hardy*, notaries-public, and co-notaries in the premises, subscribe the same for him, he having, in token of his authority, touched our pens respectively, and authorised us to do so; the said deed having been previously read over and explained to the said *John Reid*, in presence of us and the four subscribing witnesses; and the said deed is accordingly not subscribed at all by the said *John Reid*, pretended granter thereof.” The ground of challenge was, that the deed had not been executed in conformity with the provisions of two *Scotch* statutes, the first of which, passed in 1540, enacted, “ That no faith be given in time coming to any obligation, bond,

(a) Reported in the Court below, 13 Fac. Coll. Dec. 226.

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or other writing, under seal, without the subscription of him that owns the same, and witnesses; or else, if the party cannot write, with the subscription of one notary thereto." The second Act, passed in 1579, upon the same subject, contained these provisions: "That all contracts, obligations, reversions, assignations and discharges of reversions, and generally all writings importing heritable title, or other bonds and obligations of great importance, to be made in time coming, shall be subscribed and sealed by the principal parties, if they can subscribe; otherwise by two famous notaries, before four famous witnesses, denominated by their special dwelling-places, or some other evident tokens that the witnesses may be known, being present at that time, otherwise the said writs to make no faith."

The Appellant, who instituted the challenge, was the eldest son and heir-at-law of the testator. The defenders were the trustees nominated in the settlement.

The only ground of challenge which it is requisite to notice, was the following:—"That the trust-deed and codicils brought under challenge, are *in totis* null and void, in respect of not being subscribed by the alleged granter; and this both at common law and under the Acts 1540, c. 117, and 1579, c. 80, and other relative statutes."

The Appellant contended, in substance, that the testator, though labouring under a state substantially of total blindness, and having called in the assistance of notaries, from a desire "to execute the foregoing deed in a valid form, so as to exclude challenges on the head of blindness or defect of sight," was yet not legally entitled, either at common or statute law, to execute his deeds through the medium of notaries,

but was bound to adhibit his subscription thereto with his own hand; and consequently, that the writings, under challenge, not being so subscribed with his own hand, were null and void. The amount of physical ability possessed by the testator to execute the deed was at first made the subject of discussion, but the parties subsequently agreed to take the judgment of the Court upon the statement of facts set forth in the following joint minute:—

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“ The parties to this cause having, since the record was made up, informed themselves more accurately on the matters in dispute, and being desirous of avoiding the necessity of a jury trial, agree to hold the following as the admitted facts of the case, with reference to plea in point of law, touching the validity of the execution of the deeds under reduction :

“ 1. That the late *John Reid*, at the dates of the deed and codicils in question, could subscribe his name, and was in the practice of subscribing it to writings requiring his signature.

“ 2. That the said *John Reid* was, at the dates aforesaid, not totally blind, but that his sight was so defective that he could not read any written document, nor decipher the signature attached to it; although able, at the time of his own subscription, to infer, from general appearances, that he had affixed it, but not, by his mere vision, to decipher the same afterwards.”

The Court, by an interlocutor pronounced on the 13th of *December* 1837, repelled the reasons of reduction, in so far as founded on the deeds having been executed by means of notaries, and not by the subscription of *John Reid*, the maker; and to the same extent sustained the defences, and decreed, &c.

The appeal was against that interlocutor.

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The *Lord Advocate*, for the Appellant:—The testator was not entitled to execute this deed by notaries, but ought to have signed it with his own hand. If a man can subscribe his name, if he has the bare capacity of writing, he must execute a deed of this sort by his own subscription. That is the rule of law, and a deed not executed according to that rule is void. The execution by notaries is only permitted to persons who cannot subscribe their names. That is the first objection; the second is that this is a notarial document, and if the party executing it was in such a state as to entitle him to have recourse to the assistance of notaries, the instrument itself ought to set out that fact in a clear and intelligible manner. It does no such thing, but merely states that *Reid*, not being able to read or write clearly, has had recourse to notarial assistance. The decision of this House in *Duff v. Lord Fife*(*b*), shows that this mode of execution, under circumstances like the present, is contrary to law.—[The *Lord Chancellor*: I do not know what is meant by the words, in this statement, that he was “able to infer from general appearances.”]—Those words are used because there have been some cases in which the party has gone through the manual operation of marking the letters of his name, and yet no effect of writing has been thereby produced. In *Tait on Evidence* (*c*), it is stated as the clear rule of law that a party possessing the ability to execute a deed with his own hand, must so execute it. It is now a settled point that writing is a necessary solemnity, and that the admission of the party of his intention to execute cannot supply the want of the proper solemnities. If the statutes require,

(*b*) 1 Sh. 498 ; 2 Wils. & Sh. 166.(*c*) 2 Edit. p. 119.

as they do here, a particular act to be performed in reference to the execution of a deed, and that act is not performed, it is not sufficient to say that the subscription is really the genuine result of the party's intention. *Erskine* is an authority on this point (d); *Duff v. Lord Fife*, which is twice reported, fully bears out that proposition.—[The *Lord Chancellor*: Is it part of the Appellant's proposition that a blind man cannot execute by notaries? There does not seem to me to be anything in Lord *Fife's* case going to that extent. That case only seems to decide that a blind man may, but not that he must, execute by his own signature.]—It cannot be shown that the statute allows a double mode of execution. If so, then the case of *Duff v. Lord Fife* establishes that the signature by the party himself, he being able to write, is the only lawful mode of execution of a deed. The statute divides all persons executing deeds into two classes, those who can and those who cannot subscribe; and the Appellant submits that if the man can execute by writing, he must do so. The words of the statute exactly express this meaning. *Veitch v. Horsburgh* (e) will be cited to show that if a party represents that he cannot write, his execution by notaries will be valid; but it is clear that a case referring so much to the will or the caprice of the party himself cannot be maintained. In order to support the doctrine contended for by the other side, the argument must go the length of asserting that if a party is able to write and can see completely, he may still avail himself of the option of executing the deeds by notaries. Such an argument is too absurd to be put forward; and yet, without adopting it, the direction of the Court below cannot be supported.

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(d) *Ersk.* bk. iii. tit. 2, s. 7.

(e) *Morr.* 16834.

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Sir *W. Follett*, on the same side:—This is not a question between a person who has executed a deed, and another person who seeks to enforce the execution of it. It is a contest between a person claiming under the deed, and the heir whose interests are affected by it. That makes a difference in the principle of construction to be applied to the statute. A party who has executed a deed by notaries, on the faith of his own statement that he cannot write, certainly cannot be allowed for his own benefit to contradict the statement he has previously made. But that reason does not apply to an heir who comes in to reduce a deed irregularly executed, and the law must be construed in his favour. The Appellant here submits two propositions: first, that the deed is not properly subscribed by a person who was capable of subscribing, and that the subscription of a party who is capable of subscribing a deed is essential to its validity; and, secondly, that if a party executing a deed is, by way of exception to the general provisions of the statute, entitled to give authority to notaries to execute the deed for him, there should appear on the face of the document itself the facts which brought it within the exceptions in the statutes. Neither of the things thus required to be done has been done here. There needs not be any reference made to the English law, for a deed executed like this would be totally void here. Before these statutes, the law was the same in both countries. The only ground of exception to the rule requiring a man to execute a deed by his own subscription, is that he cannot write. Here the party could write and did write long letters. There was therefore nothing to bring him within the exception of the statutes. In *Bell's Lectures* (*f*) there are many

(*f*) 5th Lecture, pp. 149-162, &c

statements on this point which show the construction that these statutes have always received among the profession in *Scotland*; and his opinions are borne out by the cases of *Ogilvie v. Din* (g), and of *Falconer v. Arbuthnot* (h). From the consideration of all the authorities it appears that the law may now be considered to be settled to this effect, that even where a party is not able to read writing but is able to sign his own name, the proper mode of execution is by his own signature, and not by the aid of notaries. That rule has not been complied with here, and the execution of the deed is therefore void. But even supposing that the party was in circumstances which entitled him to execute by notaries, then the statement of his inability according to the terms of the statute ought to have been made on the face of the deed; *Mackenzie v. Burnet* (i). That has not been done here, the statement being merely that he “cannot see to read writing clearly;” a statement which does not in any way satisfy the requisitions of the statute.

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Mr. *Pemberton*, for the Respondent:—The first objection to the execution of this deed is, that the formalities alleged to be required by the statutes have not been complied with. It is clear that the object of the statutes was to prevent fraud; and that, under such circumstances as exist in this case, the execution by notaries was best calculated to secure that object. A person not able to read writing clearly, might have a deed presented to him of a nature totally different from that which he intended to sign, and might thus be made to put his signature to a forgery. This could be effected much more easily by one person getting

(g) *Morr.* 16829.

(h) *Id.* 16817.

(i) *Id.* 16838.

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the half-blind man to sign a deed, than by two notaries being called in to execute the deed in the presence of four witnesses. What does the statute say? That if a man can write he shall sign his name, or that the deed shall be void. That provision is merely directory. Now, where a statute has said that a deed should be signed with the Christian and surname of the parties, a deed signed only with the initials of the party who was shown to be accustomed so to subscribe his name has been held sufficient, because the provision was construed as merely directory; *Piery v. Ramsay* (*k*). And in *Houston v. Houston* (*l*), a bond so subscribed by a party then resident in *Ireland* was held good, without the pursuer being put to prove that the granter was accustomed to subscribe in that manner; *Grierson v. Grierson* (*m*), *Brown v. Johnston* (*n*), *Galloway v. Thomson* (*o*), and *Ker v. Gibson* (*p*), all show that where it is proved that a party has been accustomed to subscribe by initials, such subscription, being duly attested, shall be deemed sufficient. *Casamajor v. Strode* (*q*) was a case of a similar sort. There an Inclosure Act provided that certain oaths should be taken, and other things done, by the commissioners, and the whole authority of the commissioners depended on their having complied with these solemnities: yet though these solemnities had not been observed, the proceedings of the commissioners were held not to be void, because the provisions of the statute were merely directory. In like manner, the acts of the revising barristers under the Reform Act have not been questioned merely on account of the omission of certain

(*k*) Morr. 16801.

(*l*) Id. ib.

(*m*) Id. 16802.

(*n*) Id. 16803.

(*o*) Morr. 16805.

(*p*) Id. ib.

(*q*) 5 Sim. 87; 2 Myl. & K.
 706.

formalities which the statute had directed to be observed, but without which the statute had not said that the proceedings should be null and void. It is not necessary, in order to justify a subscription of this sort, that it should be physically impossible for a man to subscribe his name; it is sufficient if he cannot subscribe his name in the usual manner. The case of *Duff v. Lord Fife* (r) does not decide the question now before the House. That case merely decided that a man who was under personal disability to a certain extent, might still, if he pleased, execute the deed with his own hand; but it did not decide that he was necessarily compelled to adopt that mode of execution, or that the deed would be void if executed in a different manner.

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Mr. *Anderson*, on the same side:—There is nothing in the summons which gives rise to the objection now made as to the execution and attestation. The first exception only is available to the Appellant: that objection is not sustainable in law. There is a distinction in the language of the two statutes: the one says, inability to write; the other, inability to subscribe. The second implies more than a mere capacity to make with a pen the marks which would form the letters of a man's name. But even if the statute required these formalities, the omission of them would not make the deed void, for the statute is merely directory. The distinction between a directory and a mandatory statute is taken by the Lord Chancellor in *Marwell's* case (s), where he says, "unless a statute is imperative, and provides expressly or by plain implication for the invalidity of an instrument

(r) 1 Sh. 498; 2 W. & S. 166.

(s) 5 Wils. & Shaw, 276.

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if the requisites be not complied with, it is merely directory, and one of the propositions in law the best known and most commonly cited is, that a directory order in a statute need not be complied with." The argument on the other side goes to this length, that a man absolutely blind, if he can put his pen to paper, must subscribe his own name, and cannot execute an instrument by notaries. Such a practice would open a door to the most extensive frauds, and thus defeat the very object of the statute, which desired in a case of that kind to protect a person labouring under a strong degree of disability, by surrounding him with witnesses whose presence should secure the honest execution of the deeds by which he disposed of his property.

The *Lord Advocate* replied :—The argument for the Respondent has not established that a man who is capable of writing, has an option to execute a deed by his own signature or by that of notaries. The words of the statute are positive, "if a man cannot write;" they are not, "if a man cannot clearly see to read writing." Yet the latter is the meaning attempted to be affixed to the provisions of the statute. To give it that meaning would be entirely to change its provisions.

The *Lord Chancellor* :—My Lords, this is a question which by an agreement entered into between these parties is reduced to a very short point, depending upon circumstances which have been agreed to, and which formed the ground for the judgment in the Court below. The facts are stated very fully in the printed papers, the object of the suit being to raise the question as to the validity of an instrument exe-

cuted by *John Reid*. The circumstances under which the deed was executed, and the state of *John Reid* at the time of executing the deed, are to be found in the admissions which I will now read to your Lordships :—“ 1. That the late *John Reid*, at the dates of the deed and codicils in question, could subscribe his name, and was in the practice of subscribing it to writings requiring his signature. 2. That the said *John Reid* was at the dates aforesaid not totally blind, but that his sight was so defective that he could not read any written document, nor decipher the signature attached to it, although able at the time of his own subscription to infer, from general appearances, that he had affixed it, but not by his mere vision to decipher the same afterwards.” These facts are important from the provisions of two *Scotch Acts*, which are respectively of the dates of 1540 and 1579. The first provides, “ That na faith be given in time cumming to ony obligation, bond, or uther writing under ane seale, without the subscription of him that owe the same and witnesse, or else, gif the partie cannot write, with the subscription of ane notary thereto.” The second Act is nearly similar in terms, with however one difference. The second enacts, “ That all contractis, obligationes, reversionis, assignationis, and discharges of reversionis, or eiks thereto, and generallie all writtes importing heritabill titill, or utheris bondes and obligationes of great importance to be made in time cumming, sall be subscribed and sealed be the principal parties, gif they can subscribe.” In the second Act the words “ cannot write,” which are to be found in the first, are changed for “ cannot subscribe ;” and the provision in the second Act is, “ urtherwise be twa famous notars, befoir four famous witnesses denominat be their speciall dwelling-places or sum uther evident

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tokens that the witnesses may be knawen, being sent at that time ; uthewise the saidis writs to na faith."

It was observed, and very justly observed, this part of the Act which declares that documents not actually subscribed shall have no validity unless one or other of those forms required for the execution of the instrument have been complied with is not absolutely compulsory. The question is, whether under that Act the instrument in question, which was subscribed, not by the party himself, but subscribed by notaries so provided for by the Act of Parliament, is to be invalid or not, in consequence of not having been subscribed by the party himself. The proposition on the one side was that it was valid and on the other it was said that that proposition was capable of being urged to consequences which were not a little startling. It was said that if that mode of subscribing be permitted, it would be impossible at almost any time or under any circumstances, to object to an instrument because it was executed by notaries ; the argument being, that if the party is capable of subscribing, he might still be entitled by his own will, to execute the instrument by notaries and then it would happen that any person, however competent, might be entitled to adopt this form of execution. But your Lordships will observe that the argument may be raised on the other hand :—it may be said that the proposition contended for would lead to this conclusion, that a party absolutely blind might still execute the document by himself ; for though he was not capable of seeing, if he was capable of writing (as all persons who have ever been capable of writing before they are blind, must be capable of doing to a certain extent after they become blind) he would still be bound to execute the instrument by himself.

It is quite obvious that this would open a door to great fraud ; for if he was obliged to execute an instrument by himself, under such circumstances, it would by no means follow that he was subscribing the document which he intended to subscribe: another might be put before him, and he would be quite incapable of knowing whether the document to which he did subscribe his name was the document he intended, or was another fraudulently imposed upon him.

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In the short view I propose to take of the authorities it will not be necessary to consider what may be the rule in cases other than that which is identically before your Lordships at this moment, and I shall therefore avoid doing so ; the more especially as I believe it a dangerous practice at all times to go into the consideration of what would be the rule in other cases, unless you are compelled to do so. We have here the fact admitted that the party, though able to write and subscribe his name, was not able to read writing afterwards ; that his sight was so defective that he could only know from the general appearance of the paper that he had subscribed a document.

It appears, my Lords, that these are statutes of ancient date ; and if any real doubt exists as to the construction of them, it is well that we should look to the construction which has been put upon them from the time when they were first passed, and to the habit which has grown up as the consequence of such construction. It will be desirable to consider those circumstances before your Lordships decide upon the case ; for if you laid down a rule of law different from that which has been in ordinary operation for a long period, you might by such a judgment invalidate the titles of property, and interfere materially with the interests of those who are concerned with property in

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Scotland. My Lords, on the construction of the statutes the authorities seem to me to have been most reasonable. I should have thought that there was no great difficulty in the case, if this question had arisen for the first time; if we had had to put a construction for the first time upon those statutes, without any previous decisions having existed. It appears to me a strong proposition to say that, on the meaning of the statutes, a party may be said to be capable of subscribing his name when he is not capable of reading the document which he has so to subscribe, or the name when he has subscribed it. But we need not necessarily discuss what might be the meaning if the question was entirely new, for from the earliest period your Lordships will find that the construction put by the Courts of *Scotland* has been, that a party under circumstances similar to those which now exist, has at all events been considered as at liberty to use the interposition of notaries.

My Lords, before adverting to those authorities the question may be naturally asked what authorities there are to be found in support of the proposition of the Appellant; what decisions there are in the *Scotch* law to show that a person not capable from want of sight of reading a document, is yet to be the person who must subscribe it, and is not to be at liberty to avail himself of the assistance of notaries. There is not one case in favour of any such proposition. On the other hand there is a variety of cases, in some of which it has been decided and in others it has been assumed that where a party could not read he was at liberty to avail himself of the interposition of notaries: *Crosbie v. Picken*, in 1749 (*t*), *Falconer v. Arbuthnot*, in 1751 (*u*), and *Ross v. Aglianby*, in 1792 (*x*),

(*t*) *Morr.* 16814.

(*u*) *Id.* 16817.

(*x*) *Id.* 16853.

all decided directly or they all indirectly assumed such to be the rule of law in *Scotland*. The case of *Craig v. Collison*, in 1610 (*y*), *Ogilvie v. Din*, in 1612 (*z*), of *Veitch v. Horsburgh*, in 1637 (*a*), and of *Littlejohn v. Hepburn*, in 1608 (*b*), and *Thomson v. Shiel*, in 1729 (*c*), are not directly decided on the same point, but they all seem to me to support the same proposition.

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But then, my Lords, it is said that these cases do not apply, for that the question in all of them was raised with regard to the person who had himself subscribed the document, and who, to avoid the consequences of his own act, had set up the defective execution in answer. It is true that the party in all of those cases was in that situation, but in all those cases this defence was overruled. An attempt was therefore made to exclude those cases from your Lordships' consideration, on the ground that in all of them it was the personal objection of the party himself to the deed being enforced against him, and he must be looked at as an individual endeavouring to defeat the consequences of his own act by a technical objection. But how was the Court competent to know what was the conduct of the party, without, in the first instance, receiving the document in evidence? If the document was required in law to be in writing, the Court was obliged to receive it in evidence in order to know whether it was or not a valid deed, and such it must be before the party need try to evade the consequences of his own act. The party was obliged to have some form of executing an instrument.

Then it is said, on the other hand, he is not at liberty

(*y*) Morr. 16828.
(*z*) Id. 16829.
(*a*) Id. 16834.

(*b*) Morr. 16828.
(*c*) Id. 16810.

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to deny the instrument which he has executed. He is at liberty to deny the execution of an instrument; he may plead *non est factum*; he is at liberty to do that, and to show that he has not executed the instrument according to the forms required by law. I do not think, therefore, that it can be considered that this class of cases is immediately applicable to the present subject. We return, then, to the question of the validity of execution of the instrument.

My Lords, there is a case in the year 1681, *Straiton (d) v. Straiton*, which seems to me to be of more weight than those relied on by the Appellant. It appears that that was a case in which the question before the Court was whether a party was at liberty to execute a document with initials, whether a signature so as to be sufficient, and it was stated that the party in question was so far blind as not to be capable of writing the writing. The Court held that that was sufficient for an instrument. That, my Lords, was in the year 1681. Some of the cases I have referred to are cases antecedent, and some of a subsequent date; so that there are concurrent decisions for a long series of years, showing that a party might properly execute an instrument either in initials subscribed by him or with his own name subscribed by the intervention of notaries.

Those cases, my Lords, do not appear to have been brought under the consideration of the Court, but have been attended to by the Judges, when the case of *Duff v. Lord Fife* arose. That case came before the Court of Session upon proof that Lord Fife was nearly in a state of blindness, and there the Court of Session held that the deeds executed by him were

(d) Morr. 6842 & 16804.

well executed, though he had subscribed his own name thereto, because he was in the state I have mentioned, and that he ought, therefore, to have had the intervention of notaries ; and this House reversed the judgment of the Court of Session, and held that if he could so sign the instrument it might be good, notwithstanding his state of blindness. My Lords, the only ground by which the Appellant has attempted to support his case rests on the decision of the case of Lord *Fife* in this House. It was with a view of considering whether that decision was inconsistent with the others which had preceded it, and whether it necessarily rendered the subscription of the deed in the present case bad, that I suggested to your Lordships the propriety of adjourning the consideration of the present case. I have since gone through all the cases, I have examined all that was said in the case of Lord *Fife*, both by Lord *Eldon* and by Lord *Redesdale*. The only point I considered was, whether by that case it is settled that the party is bound to execute by his own subscription under circumstances like the present ; and, my Lords, I do not think that there is anything in that case which says that a person under those circumstances is not at liberty to resort to this mode of notarial execution. There could not be any such point in that case ; for the decision that under such circumstances as there existed he may execute a deed by himself, does not necessarily involve the other decision, that he is not at liberty to resort to the intervention of notaries.

My Lords, it appears then that for two hundred years there is no direct authority for the proposition now contended for by the Appellant, but on the contrary a series of decisions the other way. In *Coutts v. Straiton*, in 1681, the construction put upon this statute was, that a person with a degree of want of

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sight such as exists here, was at liberty at all events to execute by the intervention of notaries; and against that decision nothing has been relied on, on the other side, but the supposed opinion of this House in Lord *Fife's* case, which did not decide this point, but decided in a manner quite consistent with the allowance of this mode of execution.

My Lords, a variety of evils might arise from your Lordships now laying down a rule not consistent with the former decisions. A mass of property would be affected by it; a matter which would deserve very serious consideration, even if there was more in the case of the Appellant than I think there is. On the other hand, it does not seem to me that any difficulties will arise from the adoption of the course which I shall recommend to your Lordships. I have therefore come to the conclusion which I shall now state to your Lordships: that the form of execution adopted under these circumstances is good; that the party may under these circumstances, if he pleases, execute the deed by his own signature; but that he is also at liberty to resort to the assistance of notaries. As the decision now appealed from was unanimously adopted in the Court below, I shall move your Lordships that the judgment of the Court below be affirmed, and that it be affirmed, with costs.

Judgment affirmed, with costs.

DUDLEY PERSSE and Others - - - - *Appellants.*

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Feb. 13. 17,
18. 20.
May 7.

ROBERT PERSSE, ROBT HENRY PERSSE, }
and Others - - - - - } *Respondents.*

By indenture made in 1827 between *R. P.* and his eldest son *D. P.*, reciting that *R. P. P.* of *C.* was seised of large real estates, was never married, and was then in a state of mental and bodily imbecility; that in the event of his dying so seised, intestate and without issue, *R. P.* as his heir at law would be entitled to the reversion of his estates in fee; that *R. P.* was desirous of having a commission of lunacy sued out for the protection of *R. P. P.* and his property and of his own reversion, and that *D. P.*, at *R. P.*'s request, agreed to sue out and prosecute such commission and take other necessary law proceedings at his own expense, in *R. P.*'s name; *R. P.*, in consideration of the agreement and of love and affection for *D. P.*, covenanted to convey all the estates that would descend to him on the decease of *R. P. P.* to the use of himself for life, remainder to the uses expressed respecting the estate of *R.* in *D. P.*'s marriage settlement, being for the benefit of *D. P.* and the heirs male of the marriage. The commission was accordingly issued; *R. P. P.* was declared a lunatic, and *D. P.* was reimbursed for his expenses out of his estate. *R. P.* was then 63 years of age; the lunatic was 40; *D. P.* was younger. The lunatic died in 1829, and *R. P.* entered into possession of his real estates, and conveyed them to his second son, *R. H. P.*, for valuable consideration. On a bill filed by *D. P.* to set aside that conveyance and for specific performance of the covenant, *R. P.*, by his answer, said he entered into it without legal advice, and by fraud, imposition and misrepresentation on the part of *D. P.* It was proved in evidence that both parties employed the solicitor who prepared the indenture under advice of counsel for each; that *R. P.* read it and heard it read before executing it, and afterwards as well as before expressed his desire that the estate of *C.* should be united to the estate of *R.* and go to his eldest son.—

Pleading.
Covenant
between Father
and Son.
Consideration.
Legality.

HELD by the Lords (reversing a decree which dismissed the bill) that *R. P.* tendered a false defence, and that all the matters put in issue by his answer were disproved by the evidence.

A party after failing in the defence set up by his answer is not to be permitted to try another defence depending on matters not put in issue by the answer, and which, therefore, his adversary had no opportunity of disproving.

The indenture of covenant was not void or illegal for champerty

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or maintenance, or as against public policy, or fraud on the jurisdiction in lunacy, or want of mutuality. (*Infra*, p. 316.)
 Regard being had to the ages and relative situation of the parties, and to the benefits secured by the issuing of the commission, there was some, and not very inadequate consideration for the covenant. (p. 317.)

Deeds in the nature of family arrangements are exempt from the rules applicable to other deeds; the consideration for the former being partly value, and partly love and affection. (p. 318.)

BY an indenture dated the 30th of *October* 1799, cera in lands in the counties of *Galway* and *Roscommon*, hereinafter called the *Roxborough* estate, and worth about 4,500 *l.* a year, were limited to the use of the Respondent *Robert Persse* for life, with remainder to his first and other sons successively in tail male. He had issue, the Appellant *Dudley Persse*, his eldest son; the Respondent *Robert Henry Persse*, his second son; and another son and four daughters.

By another indenture, dated the 1st of *May* 1823, and made between the said *Robert* and *Dudley Persse* of the first and second parts, and other parties of the third and fourth parts, the said settled estates were conveyed to the use of *Dudley*, his heirs and assigns for ever, subject to an annuity of 800 *l.* thereby made payable thereout to *Robert* the father during his life, by quarterly payments, and subject also to a sum of 6,000 *l.* for the younger children, and to certain debts and incumbrances amounting to about 17,500 *l.*; and it was thereby provided that in the event of the decease or preferment in marriage of any of the six younger children, the said annuity should be reduced by the sum of 60 *l.* yearly for each such younger child dying or marrying, but not be reduced to less than 500 *l.* a year. In the events that happened the annuity had been, previously to the year 1827, reduced to the yearly sum of 500 *l.*

By an indenture of release, dated the 11th of *November* 1826, being the settlement executed on the marriage of the Appellant with *Catherine O'Grady*, daughter of the then Lord Chief Baron of the Court of Exchequer in *Ireland*, the several estates comprised in the deed of 1823, subject to the said annuity, were settled to the use of the Appellant for life, with remainder to the first and other sons of the marriage successively in tail male, with remainder to the Appellant in fee.

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In the year 1827 the Respondent, who was then about the age of 65, was the heir presumptive of his cousin *Robert Parsons Persse*, who was about the age of 40, unmarried, and considered to be a person of unsound mind. The Appellant would be his heir presumptive in the event of their surviving the Respondent. *R. P. Persse* was at the time seised of real estates, called the *Castleboy* estate, of the value of 2,500 *l.* a year, and possessed of personal property to the amount of 25,000 *l.* The Appellant and his solicitor, Mr. *Charles O'Connor*, who had also sometimes been solicitor to the Respondent, suggested to him the expediency of issuing a commission of lunacy against *R. P. Persse*. The Respondent came to *Dublin* for the purpose of taking the necessary proceedings, and there executed the following deed, which is the subject of the suit in which this appeal originated.

By an indenture made on the 8th of *December*, 1827, between the Respondent and the Appellant,—after reciting that *Robert Parsons Persse*, of *Castleboy*, in the county of *Galway*, esquire, was then seised in fee of the lands, hereditaments and premises in the indenture particularly described, and that in the event of his dying so seised, intestate and without

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issue, the Respondent, as his cousin and heir-at-law, would be entitled to the remainder or reversion in fee simple of the said lands, hereditaments and premises expectant upon his decease; and that the said *R. P. Persse* had never married, and was then, and had been for several months, in a state of mental and bodily imbecility, and that it would be necessary for the protection of his person and property to sue out a commission of lunacy against him, and to institute other law proceedings, and that for such purposes expenses would be incurred, and advances of money should be made; and that the Respondent was anxious that such proceedings should be instituted for the purposes aforesaid, and for the purpose of protecting his own rights to the reversion in fee as heir-at-law; and that the Appellant had agreed to sue out such commission, and to institute such other law proceedings as should thereafter become necessary for any of the aforesaid purposes, in the name of the Respondent, and at his own expenses and charges; and further reciting that the Respondent, in consideration of such agreement, and of the natural love and affection which he bore for the Appellant, had agreed that his expectancy of and in the said lands, hereditaments and premises, and the same when they should descend to him on the decease of the said *R. P. Persse*, should be limited to the use of the Respondent and his assigns for life, and from and after his decease to the uses thereafter mentioned:—it was witnessed that, in pursuance of the said agreement, and in consideration of the natural love and affection which the Respondent bore to the Appellant, and in further consideration of the sum of 10s., the Respondent did for himself, his heirs and assigns, covenant and agree to and with the Appellant, his heirs and assigns,

that from the decease of the said *R. P. Persse*, all the lands of *Castleboy* (then followed several other denominations), and all other the real and freehold estates of which the said *R. P. Persse* was seised, and which on his death should descend to the Respondent, should be and remain vested in him from the decease of the said *R. P. Persse*, to his own use for his life, and from and after the determination of that estate, then to the use that the same should be so settled and conveyed as that they should be and remain for and upon the several uses, &c. and subject to such provisos, &c. as were expressed of and concerning the lands of *Roxborough*, by the hereinbefore in part recited indenture of the 11th of *November* 1826. And the Respondent, for himself, his heirs, &c., covenanted with the Appellant, his heirs, &c., that all the said hereditaments and premises agreed to be sold as aforesaid, with their appurtenances, should at all times remain and continue for the said purposes declared in the said indenture concerning the same, without any hindrance or claim from the Respondent or any persons claiming through him.

This deed had been prepared by Mr. *O'Connor* in pursuance of instructions received at his house in *Dublin*, from the Respondent and Appellant. Mr. *O'Connor* had two drafts made, which he laid before different counsel on behalf of the two parties respectively. Two engrossments were afterwards made conformably to the draft, as amended by the counsel, and both were executed by the Respondent and Appellant at the house of the Lord Chief Baron, the corrected draft having been previously read aloud to them by Mr. *O'Connor*. The Respondent, after executing the deed, handed his part to the Lord Chief

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Baron, and told him not to part with it without personal application (a).

In *March* 1828, a commission *de lunatico inquirendo* was issued in the name of the Respondent against *R. P. Persse*, and after a long inquiry it was found that he was of unsound mind from the 17th of *November* 1826, with lucid intervals. The lunatic died in *October* 1829, intestate, and his real estates descended to the Respondent, who soon after the lunatic's death entered into possession of the *Castleboy* estate, ploughed up part of the meadow land, and cut a large quantity of timber (a).

By an indenture, dated the 9th of *June* 1830, and made between the said Respondent, of the first part, the Earl of *Rosse*, of the second part, and the Respondent *Robert Henry Persse*, second son of the Respondent *Robert Persse*, of the third part, after reciting that *Robert Persse* was seised in fee simple in possession of the said estate, and had sufficiently provided for his eldest son by the deed of *May* 1823, and was desirous to settle the remainder in fee of this estate on his second son *R. H. Persse*, and that he agreed to purchase the same, it was witnessed, that in pursuance of such agreement, and in consideration of 16,000*l.* secured to the Respondent *Robert*, as in the indenture mentioned, he granted, sold, and released unto the Earl of *Rosse* all the lands of *Castleboy*, &c. and all other estates of inheritance which descended to him as heir-at-law of the said lunatic, upon trust, to the use of the said Respondent, for life, and after his decease for the use of the other Respondent *R. H. Persse*, his heirs and assigns, for ever.

(a) *Vide infra*, extracts from the evidence, p. 290 *et seq.*

The Appellant's first wife, *Catherine O'Grady*, having died in 1829, leaving a son and two daughters, the issue of the marriage, the Appellant intermarried in *July* 1833 with *Frances Barry*, and by the indenture of settlement made in contemplation of that marriage, he, in consideration of her marriage portion, conveyed the reversion in fee, expectant on the determination of the estate in tail male, limited to the first and other sons of his marriage with his first wife by the settlement of *November* 1826, in the *Roxborough* estate, to trustees, to the uses therein declared; remainder to the use of the first and other sons of the marriage with *Frances Barry*, &c.; and the Appellant thereby covenanted that when he should come into possession of the *Castleboy* estate, by virtue of the said indenture of the 8th of *December* 1827, he would assure the reversion in fee of that estate to the same uses and trusts as were in this indenture expressed concerning his reversion in fee in the *Roxborough* estate. All the parties to this indenture had notice of the indenture of 1830, between the Respondents.

In *June* 1835 the Appellant and his wife, and the children, the issue of the two marriages, filed their bill in the Court of Chancery in *Ireland* against the Respondents *Robert Persse* and *Robert Henry Persse*, and the Earl of *Rosse*, and several other defendants who had been named trustees in the various indentures before mentioned; and the bill, after stating, among other things, the said indentures of *November* 1826 and *December* 1827, charged that the latter deed was deliberately executed by the Respondent, and that he derived great personal benefit from the prevention of fraud and imposition on *R. P. Persse* by the establishing of his lunacy, which the Respon-

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dent was unable to do without the aid of the Appellant; and that he was heard to declare that he intended the *Castleboy* estate to go to the male issue, with the *Roxborough* estate, and that Mr. *O'Connor* was mutually employed by them both in preparing the said deed, and that the Respondent had also the advice of counsel; and the bill, after stating the said indenture of *June* 1830, charged that the same was voluntary, without consideration, and with notice on the part of the Respondent *R. H. Persse* of the deed of *December* 1827. The bill prayed that the said indenture of the 9th of *June* 1830 might be declared fraudulent and void, and that the Respondents *R. Persse* and *R. H. Persse*, and the Earl of *Rosse*, might, in pursuance of the covenant of *R. Persse* in the indenture of the 8th *December* 1827, be compelled by the decree of the Court to convey the *Castleboy* estate to and for the several uses and trusts specified and mentioned in the said settlements of the 11th of *November* 1826 and 15th of *July* 1833, so far as the same were then capable of being effectuated; and that it might be referred to the Master to prepare a proper deed of conveyance for those purposes, and that the Respondents *R. Persse* and *R. H. Persse* might be restrained, by injunction, from cutting down any timber or other trees upon the said premises of *Castleboy*, or from burning any of the land, or committing any other waste on the said estate; and that an account might be taken of the waste committed by them, and the value thereof ascertained, and paid into Court.

The Respondents severally put in answers to the bill, and the Respondent *Robert Persse*, after stating, among other things, the said deed of 1823, and that he thereby gave up his life interest in the *Roxborough* estate, worth 4,500*l.* a year, for an annuity of 500*l.*,

in consequence of the persuasions of the Appellant and the pressure of creditors urged on by him ; and that the Appellant allowed the said annuity, which was the only means of subsistence the Respondent had for himself and family, to fall greatly in arrear, with a view of taking advantage of Respondent's distress to effectuate the Appellant's purpose of getting possession of the *Castleboy* estate ; and that in furtherance of that plan, the Appellant induced this Respondent to come to *Dublin* and reside there at the house of the Appellant's father-in-law, Lord Chief Baron *O'Grady*, who together with the Appellant persuaded this Respondent to issue the commission of lunacy and to execute the deed of *December* 1827 ; and that that deed was prepared by the Appellant's solicitor, and executed by this Respondent without being aware of its nature or effect ; and he knew nothing of its contents, as the Lord Chief Baron had refused to give him the counterpart, but he had supposed that its object was to secure to the Appellant the expenses of the commission against *R. P. Persse*, until, on examining the memorial of it at the Registry-office, he found that it contained a covenant to convey the *Castleboy* estate ; and he was induced to execute the same by the fraudulent contrivance, imposition and misrepresentation of the Appellant, and without having received any valuable consideration for the same ; and he denied that *O'Connor*, who prepared the said deed, was then or on any previous occasion his solicitor, and he denied that he had any communication with any other professional adviser while in *Dublin*, or that he ever declared it to be his object to settle the *Castleboy* estate with the *Roxborough* estate, nor was it his desire to increase the provision made for the Appellant, as Respondent's younger sons were comparatively unpro-

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vided for. And the Respondent, by his said answer, stated that the Appellant or Mr. *O'Connor* did not apprise him that the expenses of the commission would be defrayed out of the lunatic's estate, nor that it was competent for the Appellant himself to sue out the commission in his own name; and the Respondent submitted that the said deed, having been obtained from him under such circumstances, ought to be declared fraudulent and void; and even if the same had been fairly obtained, the covenant therein to settle the said estates, being a voluntary agreement as to an estate in expectancy, entered into unadvisedly and without valuable consideration, could not be enforced against this Respondent; and he admitted the execution of the said deeds of 1830 and 1833, and insisted that the latter was executed with full knowledge, by all the parties thereto, of the deed of 1830.

The Respondent, *R. H. Persse*, by his answer, repeated, on his belief, most of the statements in his father's answer; and in conclusion he submitted that he was a purchaser of the *Castleboy* estate for valuable consideration, and that the purchase-money was settled for the benefit of his father's younger children.

The bill was amended in *November* 1835, by adding as plaintiff another child of the Appellant and his said wife *Frances Barry*, born since the bill was filed; and as amended, it stated among other things, that the Respondent's annuity of 500*l.* was never in arrear above 301*l.*, or little more than one-half year's payment, up to the time of the execution of the deed of *December* 1827; and stated several occasions, between 1818 and 1830, on which Mr. *O'Connor* had been the solicitor of the Respondent; and it charged that *O'Connor*, at the time of receiving instructions

for the said deed, and Mr. *Waller O'Grady*, barrister, and son of the Lord Chief Baron, on a subsequent occasion, asked the Respondent *Robert Persse* whether he wished any provision to be made in said deed for his younger children, and that Respondent replied he did not think that necessary, inasmuch as in the event of getting the *Castleboy* estate during his life, he hoped to be able to make competent provision for them out of the savings of his income; and the amended bill also charged that the Respondent, after executing the counterpart of the said deed at the house of the Lord Chief Baron, in the manner in the bill mentioned, handed the same to the Lord Chief Baron, and desired him not to part with it without personal application from himself; and that if he afterwards made application for the same, it was by letter not written nor signed by himself, nor in any way authenticated by him.

The Respondent *Robert Persse*, by his answer to the amended bill, admitted that in *November* 1827, previous to the execution of the deed, not more than 301*l.* of the annuity was then due, but in 1826 the arrears exceeded 800*l.*; and he denied that *Charles O'Connor* had been employed by him as his solicitor in the lunacy business, or in any other business, on any occasion whatsoever, to the best of his recollection, although he might have been employed by a relation of his in carrying on some law business in the Respondent's name; and he denied that he had any conversation, as in the bill alleged, either with *O'Connor* or *Waller O'Grady*, as to making provision in the deed for his younger children. He admitted that he executed the deed, but he did so without the advice of counsel or solicitor, and without having the deed read, as far as he was able to recollect what

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passed at the time ; and he admitted that in giving the counterpart of the deed to the Chief Baron, he desired him not to part with it without application from him, and said he had frequently applied for the same by letter and by his solicitor, but the Chief Baron withheld it.

Witnesses were examined on both sides, and a great number of documents and accounts were put in evidence in the cause.

The witnesses for the Appellant deposed to the following effect :—

Mr. *Charles O'Connor*, of *Dublin*, solicitor, said he had done some law business for the Respondent or for his land-agent, from 1817 to 1820. In *November* 1827, he suggested to the Appellant, at his house at *Roxborough*, the necessity of issuing a commission of lunacy against *Robert Parsons Persse*; and after a conversation with him on the subject, witness waited on the Respondent at his house at *Newcastle*, and after talking on the subject with him, told him that the Appellant would pay the expenses if he (the Respondent) would allow his name to be used. The Respondent said he would go to the Appellant to *Roxborough*, to consult with him. Both parties came together to witness's house in *Dublin*, on the 3d of *December* following, and witness took instructions from the Respondent for the deed (of the 8th *December* 1827), which Respondent desired to be prepared with expedition. Witness asked him if he wished any provision to be inserted for his younger children, to which the Respondent replied, that in the event of his getting the *Castleboy* estate for his life, he would be enabled to save from the income thereof what would be a competency for the younger children. Witness prepared a draft of the deed, and laid it before

Mr. *Waller O'Grady* for his perusal and amendment, on behalf of the Appellant, and subsequently laid the same draft as amended before Mr. *Blackburne*, on behalf of the Respondent, and told the Respondent that he had done so. Witness and a Mr. *Nolan* were the subscribing witnesses to the deed, which was executed on the day of its date, at the house of the Lord Chief Baron *O'Grady* in *Dublin*, in the presence of the witnesses and Messrs. *Waller* and *Richard O'Grady*, sons of the Chief Baron, in this manner: this witness read aloud the corrected draft, while the Respondent and Appellant each held and perused a part of the deed; it was in two parts. After the whole had been read, the parties then executed both parts. The Lord Chief Baron was not then present, but he came into the room before and after the execution of the deed.

Mr. *Nolan*, the other subscribing witness to the deed, gave a similar account of its execution.

Mr. *Waller O'Grady* said he was present at several conversations with the Respondent in the end of *November* and beginning of *December* 1827, respecting the conveyance of the *Castleboy* estate, and heard the Respondent say more than once that he was desirous that that estate should be re-annexed to the *Roxborough* estate, and that it was a great oversight in his family to have separated them. He said he was not in a condition to prosecute the commission against *Parsons Persse*, but he had arranged with his son *Dudley* to incur the expense, and he wished Mr. *O'Connor* to take his instructions for the purpose, and he went to Mr. *O'Connor's* house for that purpose. This witness, after giving the same account of the execution of the deed as the subscribing witnesses did, added that at that time the Respon-

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dent expressed a hope that the effect of the deed would be to perpetuate the two estates in his family. One part of the deed after its execution remained with Mr. *O'Connor*, and the other part was delivered by the Respondent to witness's father, who had then come into the room. His Lordship asked the Respondent why he wished to encumber him with the deed, and the Respondent replied that he had good reasons; that his younger children, when they found he had executed it, would annoy him on the subject, and therefore he wished his Lordship to take charge of it, and not to give it, not even if he himself should write for it, unless he came in person for it.

In one of the conversations this witness had with the Respondent, on his suggesting to the Respondent whether he wished to make provision in the contemplated deed for his younger children, the Respondent made answer similar to that which he had made to Mr. *O'Connor*. The draft of the deed had been laid before this witness on behalf of the Appellant, and he made the notes, amendments and alterations which appeared on it.

Mr. *Adams*, of the county of *Galway*, an acquaintance of the Respondent, heard him say, in *December* 1827, that the estates of *Roxborough* and *Castleboy* could never again be separated, and that he had executed a deed conveying the latter to his son *Dudley*.

Two witnesses proved that after the Respondents took possession of the *Castleboy* estate, in 1830, they cut about 4,000*l.* worth of timber, and ploughed above 150 acres of meadow and pasture land.

The evidence for the Respondents was to the following effect:—

Mr. *J. Lambert*, of *Dublin*, solicitor, on receiving instructions, in 1830, from the Respondent *Robert*

Persse, to prepare the deed of conveyance of the *Castleboy* estate to the second Respondent, observed to him that he had understood that property had been settled on *Dudley Persse*. The Respondent denied having made any such disposition of it, and said the deed between him and *Dudley* went to the extent only of guaranteeing to *Dudley* the costs of prosecuting the commission of lunacy; which assertion this witness believed, because he had heard *Dudley* swear, in his examination on the lunacy, that he had no interest in the result of that inquiry. This witness knew that the Respondent had been in pecuniary embarrassments in 1826-7-8, and heard him-complain that the Appellant did not regularly pay the annuity, which was his only means of living; and witness was employed in 1830 to file a bill against the Appellant for payment of the arrears of the annuity. Witness had conducted a lawsuit for the Respondent in 1826, and was his confidential law adviser from 1830 to 1833, when he was succeeded by Mr. *Ardill*. Mr. *O'Connor* had been employed by the Respondent as his solicitor before 1826. This witness, in 1833, prepared a letter, to be signed by the Respondent, to the Lord Chief Baron (then Viscount *Guillamore*), requiring his Lordship to give the Respondent the counterpart of the deed of *December* 1827, and he accompanied the Respondent *R. H. Persse* to his Lordship's house with the letter. *R. H. Persse* was shown into his Lordship's chamber, and on his return he told witness that his Lordship said the deed was locked up in an iron safe, and the keys were in the country. A similar answer was made by his Lordship to a like subsequent application, and witness was never able to procure the counterpart of the deed.

The expenses of the commission of lunacy were

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ultimately paid out of the funds in Court to the credit of the lunatic. Witness heard Mr. *O'Connor* say that the money had been advanced by him, and not by the Appellant. It was a very lucrative suit for Mr. *O'Connor*.

Mr. *Thomas Ardill*, of *Dublin*, solicitor in the cause for the Respondents, proved that previous to the settlement on the intended marriage of the Appellant with Miss *Barry* in 1833, he, by direction of the Respondents, caused copies of the deed of 1830 to be served on the Master in Chancery to whom it had been referred to approve of that settlement (Miss *Barry* being a ward of Court with 20,000*l.* fortune), and also on all the material parties to that settlement. This witness also defended successfully an action of ejectment which was brought by a devisee under an alleged will of the deceased lunatic against the Respondent *R. H. Persse*, who paid all the expenses; no part of them was paid by the Appellant.

Mr. *Burton Persse*, the next of kin of the lunatic, and who resisted the commission, knew the Respondent to have been in pecuniary embarrassments in 1826-7-8, and he complained to witness that his annuity was not regularly paid; he had no other means of support. Witness did not know by whom the money for prosecuting the commission was advanced, but all the expenses were subsequently paid out of the lunatic's estate.

Mr. *James Blakeney*, solicitor, said that for 15 years previous to 1823 or 1824, his father, deceased, had been confidential law adviser to the Respondent, and witness believed he was succeeded by Mr. *O'Connor*. In further proof of this fact, two letters were put in evidence, one written by the Respondent from his house at *Newcastle*, the 3d *February* 1828, to Mr. *O'Connor*,

informing him that a law process was served on him. The second, written from *Castleboy*, *April* 10 (no year mentioned), complaining that *Burton Persse* was giving directions about the property.

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Upon the hearing of the cause in *February* 1837, the deed of the 8th of *December* 1827 was produced and read in evidence on the part of the Appellant; as were also three paper writings, marked respectively Nos. 2, 3, and 86, which were to this effect:—

The document No. 2 was proved by Mr. *O'Connor* as containing the instructions given by the Respondent on the 3d of *December* 1827, for the preparing of the deed; and it was thereby stated that the Respondent had agreed to convey to the Appellant his expectancy in the estate of *Castleboy*, in consideration of love and affection, reserving a life-interest in the estate, and that the Appellant should have full power to proceed in his name as to the suing out of the commission of lunacy. There was not any mention of any further contract or agreement between them. This paper appeared to have been submitted to counsel as instructions for the deed, with an observation that it was left to counsel to say whether the Respondent's life-estate should be made free from impeachment of waste, and whether he should have a leasing power; and there appeared at the foot of the paper the words following: "I have not made Mr. *Robert Persse's* estate for life free from impeachment of waste, nor given him a leasing power, not being so instructed. *J. B. M.*" These initials were stated at the bar to be the initials of *J. B. Miller*, barrister-at-law: no evidence was given as to the time when he made the memorandum, nor by whom nor on whose part he had been consulted.

The document No. 86 purported to be a draft of the deed laid before Mr. *Waller O'Grady* for his

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perusal and amendment, on the part of the Appellan the instructions for which purpose were written in the fold of the draft, and at the foot thereof were written the words: "*Quære*, leasing powers; impeachment of waste."

The consideration specified in the draft was mere love and affection, and 10*s.* It appeared by the draft that the following recitals were introduced into it by Mr. *O'Grady*: "And whereas the said *Robert Parsons Persse* is now, and has been for several months in a state of mental and bodily disease," &c. (see the substance of these recitals, *ante*, p. 282).

It further appeared that Mr. *O'Grady*, in that part of the draft which recited the agreement to convey in consideration of love and affection, and 10*s.*, introduced the words, "and from his desire to continue the estates of *Roxborough* and *Castleboy* united," and the words, "also in consideration of the advance of money by the said *Dudley* for the purposes herein before recited;" and it did not appear that he had adverted to the queries as to the leasing power and power to commit waste. Such powers were omitted in the draft.

The document No. 3 purported to be the draft of the deed submitted to Mr. *Blackburne* by Mr. *O'Connor*, on behalf of the Respondent, and appeared to be a copy of the draft as altered by Mr. *O'Grady*, with instructions in the fold, which were a copy of the instructions submitted to Mr. *O'Grady*, save that the queries as to giving the Respondent a leasing power, and rendering him punishable for waste, were omitted. It further appeared that in the draft, as settled by Mr. *Blackburne*, there had remained in the covenant against incumbrances an exception as to leases to be made by the Respondent; and that Mr. *O'Grady* had, after the draft had been so settled by Mr. *Blackburne*, struck

out that exception from the draft, and made the following observation in the margin:—

“As the object is very much to unite the two demesnes of *Roxborough* and *Castleboy*, it is not intended that either party should have leasing powers.

“*W. O'G.*”

The cause was heard before Lord Chancellor *Plunket* (b), who by a decree made on the 7th *February*

(b) The counsel on each side, in arguing the appeal, referred to manuscript notes of Lord *Plunket*'s judgment taken for the parties by different hands, and said they were the same in substance and effect, though differing in words. From copies with which we have been favoured, we make the following extracts:—

“The *Lord Chancellor*:—The bill has been filed by the son against his father and his younger brother, seeking to enforce the execution of a covenant, which is contained in a deed executed to the plaintiff by the father. The previous facts of the case, I believe, are these:—*Robert*, the father, was tenant for life of the *Roxborough* estate, bringing an income of 4,500 *l.* He by deed in 1823 reduced himself to the situation of an annuitant, by giving up his interest in these estates to his son *Dudley*, for an annual sum of 800 *l.* and a sum of 6,000 *l.* to be paid to him, covenanting that in certain events the annuity should be reduced. It appears that such events did take place as reduced the annuity to 500 *l.* *Robert* afterwards became a bankrupt, and was left solely depending on the annuity, which we find, though it should have been paid quarterly, was not even paid annually, for there was an arrear of a year and a half permitted by *Dudley* to accumulate. The only thing he appears to have had except the 500 *l.* was the possibility of becoming heir to *Parsons Persse*, if he outlived him and *Parsons* died without issue. It does not appear that *Dudley* had a similar right to the estates of *Parsons Persse*, if his father died before him, and this fact has a bearing on both sides of the case. The thing about to be purchased was not so valuable as if it did not depend upon *Robert*'s surviving the lunatic, and a small sum would be a fair consideration for it. But then the son *Dudley* is found amply provided for, the father is, I may say, in a state of destitution, and this partly produced by *Dudley*'s neglect in paying his annuity, and for the younger children he has scarcely the means of providing. *Parsons Persse*, who was seised of the *Castleboy* estates, becomes a lunatic, and if he died without issue *Robert Persse*, and after him his son *Dudley*, would be entitled to them. *Parsons Persse*, it appears, was then a man of about 40 years of age; *Robert Persse* was 63, and *Dudley* was a young man in the prime of life: thus the life of *Parsons Persse* might be as good as *Robert*'s, and that fact is material, as it seems

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1837, ordered and decreed, as to so much of the Appellant's bill as related to the subject of waste, that

to lessen the inadequacy of the consideration. But it also appears that it was highly important to *Dudley* himself to secure the estate from alienation, and he certainly undertook the case as well for his own advantage as his father's.

It appears from the state that *Parsons Persse* was in, and from his being exposed to the extortion and influence of persons who were disposed to plunder him, that it was necessary to establish his lunacy, and that this was a first and necessary measure we cannot doubt. On the suggestion of Mr. *O'Connor* to *Dudley*, it was determined to undertake the case. I have no right to enter into what should be the feelings of a son situated as *Dudley Persse* was, in possession of 4,500 *l.* a year which he got from his father, and having 900 *l.* of his father's money in his pocket; it is not my business to say what, under ordinary feelings, it would have been a natural and a fair and a just thing to do; but I do not think it would have been extraordinary generosity if *Dudley* had said to his father, "I know how you are situated; I know you have not money to undertake this matter, and I will at my own expense undertake it for you; you lending me your name." If he had done so, no person deriving from him could have complained that he had wantonly thrown away his property; or even if he had said, "I will be at the expense in this case, and when we get possession of the estate, it shall pay." No one could complain of that. But he asks the estate itself as a reward for securing it. Funds in the lunacy were ample, more than 20,000 *l.*, and the risk was only as to such portion of the costs as might not be allowed against the estate.

It is to be observed that *Robert Persse* was not the moving party in this transaction; *Dudley* had the money, and had equal interest in proving the lunacy with *Robert*; and it is plain that he and Mr. *O'Connor* induced *Robert* to embark in the matter, though they would make him appear the principal party. Mr. *O'Connor* informed himself of the lunatic's situation, and if he had then said to *Robert Persse*, "Communicate with your solicitor," which I must now remark he did not, though it is so alleged:—I say that I look upon the attempts to substantiate the allegation that Mr. *O'Connor* was the solicitor of both *Robert* and *Dudley*, to be a miserable failure:—if he had said "Consult with your relations," all might be well; but Mr. *O'Connor* took upon himself the management of the entire affair. He put *Robert* in communication with *Dudley*, and between them they persuaded him to undertake the affair in the terms I have stated. The communication was made in the latter end of *November* 1827, and from the latter end of *November* to the 3d of *December* we have no information of what passed, or of any communication having taken place between *Robert* and his man of business.

At this stage I beg to say that so far as the answer throws disparagement upon certain high names, I must express my opinion that

the same be dismissed with costs, and that the remainder of the bill be dismissed without costs ; and as to

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I consider it entirely unwarrantable ; their high character and important duties place them above suspicion in this affair ; and I would have it distinctly understood that in any observations I may think it necessary to make upon the conduct of *Dudley Persse* or *O'Connor*, I mean my remarks to apply to themselves, and not in any manner to Lord *Guillamore* or any member of his family. Mr. *O'Connor*, who, it is alleged, was the confidential agent of *Robert Persse*, takes upon himself the entire management of the affair, and without the necessary legal assistance upon the part of *Robert* promotes the advantage of his client *Dudley* ; and his conduct therefore necessarily calls for remark. It is stated that it was at the desire of *Robert* that *Dudley* consented to undertake the business : now it was by *Dudley* and Mr. *O'Connor* that *Robert* was called into activity at all. I ask, under such circumstances ought Mr. *O'Connor* to have undertaken the office of solicitor for both parties ; and if he did, was there ever a case calling more imperatively for full communication between the parties, and, above all, for a full and well-defined consideration to be paid to the party parting with the estate ? What was the consideration to be given for the fee-simple estate of 2,000*l.* *per annum* ? Why, the consideration for this valuable estate was the costs which might be incurred in preventing its alienation from the family of both. I have in my hand what is called “ Instructions for the deed,” and I must say I know of no instance of so important an instrument being based upon such a document. This is a document which it is difficult to interpret ; there are parts of it which it would appear were first written, and yet which really were not written first.—[His Lordship read passages from the instructions.]—By whom all this was written we have no explanation, or evidence of an explanation on the point being given to *Robert*. Then follows in different handwriting, “ I have not made *Robert Persse's* estate for life,” &c. “ *J. B. M.*” Who *J. B. M.* is does not appear, but I am told it is Mr. *Miller* ; neither does it appear on what authority he is found preparing this deed of conveyance. Does it appear that *Robert* knew that Mr. *Miller* was employed ? This undefined mode of proceeding would not be permitted in the commonest matter. On the other side of this paper we have what appears to be a true statement of the situation of *Parsons Persse*.—[His Lordship read a further extract from the instructions.]—Then follows a part which was afterwards scraped out : it commences, “ The agent of the Messrs. *Persses* cannot more particularly state ;” and by this part of the instructions it would be made to appear that one man was acting as agent for both *Robert* and *Dudley* ; and we must also observe in this part, which has been struck out, that there was to be an exemption from impeachment of waste, and a leasing power, preserved to *Robert*. By whom this was struck out we are not told. Did *Robert* know anything of so important a question as to whether he was or not to possess that which would give the chief value to

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the draft deed laid before Mr. *O'Grady*, the draft deed laid before Mr. *Blackburne*, and draft instruc-

his life-estate? We are not told that he did. There is no evidence of this draft ever having been submitted to *Robert Persse*, nor are we shown that the instructions were submitted to counsel employed for him with his knowledge or consent.

How ought the parties to have acted in such a case as this? It does not appear that *Robert* is ever informed that counsel is to be employed on his part or on the part of *Dudley*. Was he informed that Mr. *Blackburne* was to be his counsel? It seems to me very extraordinary that Mr. *O'Connor* felt no delicacy in acting for both parties in this peculiar case. Separate counsel is thought necessary, and why not separate solicitors quite as needful? If ever there was a case in which a person should hesitate in taking on himself the duties of solicitor for both father and son, it was this case; or if he did undertake them, he should at each step of the proceedings guard himself from suspicion by a strict intelligence and frequent communication between the parties, and by preserving all the documents and evidence connected with the affair.

The next thing I have to remark upon is the draft sent to Mr. *Waller O'Grady*. In this draft there are some parts underlined which deserve particular attention. The first portion we find so marked is this: "From desire to continue the estate of *Castleboy* and *Roxborough* united." *Robert*, we are told, said this or expressed a desire to this effect in casual conversation; but that is not a matter upon which to ground a conveyance. It goes on, "and also for consideration of expenditure of money," which is struck out, and when this striking-out took place is left to conjecture. On the 3d page is another underlineation of the following words: "for and during the term of the natural life." Then comes, "in as full and ample a manner as said lands," also underlined. Then follows in the handwriting of Mr. *Waller O'Grady*, "and whereas the said *Robert Parsons Persse* is in a state of mental and bodily disease." Would it not be a fairer recital to have said, "Whereas the said *Dudley* and *Robert* undertake this affair, but it is all thrown upon *Robert*, though in truth he has least to do in the matter?" It goes on to say that the said *Dudley*, at the desire and request of the said *Robert*, undertook this matter. Now is that a true recital, when the case was undertaken at the request of *Dudley*, on the suggestion of his solicitor? I must remark, however, that it was fairly introduced by the counsel of *Dudley* according to the instructions he received, but we have no proof that it was done with the concurrence or knowledge of *Robert Persse*.

The next thing to be observed with respect to this draft of the deed, is some writing which appears to have been put in after it came from counsel. There is, in the fold, "*quare* leasing power, *quare* impeachment of waste." It is quite clear that these *quæres* were not put in at the time it was sent to Mr. *O'Grady*; for if so he would have consulted the parties on those points, and questioned

tions marked No. 2, respectively produced at the hearing, his Lordship ordered that the same be depo-

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Robert whether he was willing to omit so important a clause as that entitling him to grant leases and preserving him from impeachment of waste. But the deed was perfected without giving him any leasing power, or other power, on which so greatly depended the value of his estate. So much for the case that was laid before *Dudley's* counsel.

There also appears to have been a case laid before Mr. *Blackburne* for *Robert*. This draft was sent to Mr. *Blackburne*, and he of course considered that it was sent by *Robert's* desire. I omitted, about the signature of Mr. *Miller* to a part of the instructions, to observe, that at the conclusion of what he has written he says, "I have not made *Robert Persse* an estate free from impeachment for waste, or given him a leasing power, not being so instructed." He here very properly suggests, that if he had received instructions for granting these powers to the person who was parting with the estate, he should have done so. It appears that these powers were advisedly left out; Mr. *Miller* seems to have an impression that it would be but fair, and the usual course, to make *Robert's* estate as valuable as an estate for life could be. Some portions of the draft laid before Mr. *Blackburne* are highly material; it was read and revised by him as counsel for *Robert*, and we find it came out of his hands giving his client the power to make leases. I find on the margin of the deed that was before *Robert Persse's* counsel, the following words: "As the object is to connect the estate, it is not intended to give either party a leasing power." On what grounds is this assertion made, or by what authority is it supported? It is in the handwriting of Mr. *Waller O'Grady*, who, as counsel for *Dudley Persse*, acted very properly in the matter; but, was it done by the authority or with the privity of *Robert*? When this question was mooted, Mr. *O'Connor* should, if he had acted fairly, have gone to *Robert* and said, "Do you wish to be made dispunishable for waste, and possessed of a leasing power?" yet, instead of that, he sends a case to counsel for *Robert* without saying one word about it to him; and when the counsel introduces a clause securing to his client his just rights, he strikes it out, and the counsel for *Dudley* is instructed to append this note to the draft as an extenuation or cause for the omission of the power to which *Robert* was fairly entitled. I dare say *Waller O'Grady* thought that it was done with the consent of *Robert*, and if that had been the case it would have been all right.

This mistake or this fraud, it might be supposed, would, between such parties, have been redressed, or at least no advantage taken of it. But is it so? *Dudley*, in the strength of it, files a bill against his father on the plea of some timber being cut down, which it appears is the most valuable part of the property on the estate. *Dudley* attempts to avail himself of a fraud committed on *Robert's* counsel and himself. If this was a bill filed by *Robert* to get

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sited with the Registrar, with liberty to all parties from time to time to inspect them.

The appeal was against that decree.

relief from an agreement in which he had been deprived of the most valuable attribute of the life estate covenanted for, could I refuse his prayer? I will not say that there is no case bearing in favour of the plaintiff in this matter, but certainly there was none cited; and I am sure that in such a matter, where the consideration was so inadequate, it should be fully proved that the most ample communication took place, and that all the rights of the person transferring the final interest in the expectancy were fairly secured.

I am told this is a family transaction, and receives a different complexion from the connexion of the parties in the case; but I cannot see that any difference exists in it from any other case, except that it is more unnatural for a son to force upon his father the execution of such a harsh and fraudulent contract. I cannot forget that his father has bountifully given him by far the larger portion of his property, and that he now seeks to strip him of the remainder: such ungenerous avarice must, to his kind father's heart, be sharper than a serpent's tooth.

There is another point which might be taken into consideration in this case: the conveyance made by *Robert* to his second son in 1830. It is a conveyance for good and valuable security: his children were very inadequately provided for, so large a portion being given to *Dudley*, and to make some provisions for others he makes a conveyance to his younger son for the sum of 16,000*l*. I would hesitate to say the time of the payment of the money is material to the title in the case, but I am not called upon to decide that. The other objection is on a more specific ground; but if the conveyance to *Dudley* is a fraudulent one, it cannot affect the person seised of the estate, and *a fortiori* not the purchaser from him. If it had been meant to act fairly by *Robert* in this case, he should have had the draft of the deeds submitted to him, and time given him to consider and consult; but not only was not this the case, but from the time that the thing called "instructions" was prepared, until the parties were assembled to ratify the deed, no communication appears to have taken place. No doubt this deed was read then, but that was no proper or sufficient time to judge of it.

I can collect from the whole of this matter that *Robert* was under an impression that he had not parted altogether with his control over the estate. If he thought so, why hand over the deed to Lord *Guillamore*? though indeed I think, at all events, that he would have been more prudent to have made himself the trustee of it. It should not have been forgotten that after the deed was handed over to Lord *Guillamore*, it was sent for and desired to be given back. I am sure it could not be got when required: however, it was then the duty of Mr. *O'Connor* to put *Robert* in possession of a copy of the deed; he did not do so, and *Robert's* counsel did not see the deed

Mr. *Pemberton* and Sir *William Follett* (Mr. *G. Richards* was with them), for the Appellants :—The decree cannot be sustained on the grounds on which Lord *Plunket*'s judgment is founded; if it can be sustained at all, it must certainly be on some other grounds than those put in issue by the parties, and the House will have to deal with this case as their Lordships dealt with that of *Attwood v. Small* (c). The answers of the Respondents are contradicted repeatedly by the evidence; their own witnesses admit the allegations of the bill. Lord *Plunket* was of opinion that the father was defrauded by the son, and his Lordship dismissed the bill, without costs, saying there was no imputation on Lord *Guillamore* or any of his family. The judgment was inconsistent; for if the bill was properly dismissed on the ground of fraud in obtaining the deed, none of the parties concerned in obtaining it was exempt from blame, and in that view the case was a case for costs. It was distinctly proved by two witnesses that the Respondent's chief object in executing the deed was to re-unite the two estates, and preserve them together in his family. The evidence not only proved the case of the Appellants, but disproved the defence.

It was clear on the face of the indenture of the 8th of *December* 1827, without going through the voluminous evidence in the cause, that the covenant contained in that deed was entered into by the Respondent for good and valuable consideration. But even

or a draft of it until the hearing of the case. Under these circumstances I do not feel at liberty to give my judgment to enforce the contract. As to the costs of the proceedings, I think that the answers put in by the defendants have not explained sufficient grounds of defence to entitle them to costs. That part of the bill, however, referring to impeachment from waste it is my duty to dismiss, with costs.

(c) *Ante*, Vol. VI. p. 232.

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if no consideration had been given, the indenture, being a family arrangement, ought to be carried into effect; *Tweddell v. Tweddell* (d), *Neale v. Neale* (e) and the cases cited in the latter case.

Mr. *Knight Bruce* and Mr. *Jacob* (Mr. *Lowndes* was with them), for the Respondents:—There is no contradiction between the case made by the Respondents and the evidence for them. The deed was purely voluntary, and unfairly obtained by the suppression of facts, and under circumstances rendering it unfit to be acted upon by a Court of Equity. The Appellant and his advisers knew very well that the expenses of prosecuting the commission of lunacy would be paid out of the lunatic's ample property. If they had a doubt of his insanity, they were guilty of a conspiracy in suing out a commission against him. But as it was quite notorious at the time that *Parsons Persse* was a person of unsound mind, any solicitor in *Dublin* would be glad to prosecute the commission at his own risk; there was no risk in fact. Besides, the solicitor had the security of the Respondent's property for his costs, as the commission was in his name; so that no consideration whatsoever passed from the Appellant for this valuable estate. The decree left the Appellants at liberty to proceed at law on the covenant.

It was absurd to call this a family arrangement; it was never put on that ground in the Court below. The cases referred to had no application to this; but Lord *Eldon's* observations in *Gordon v. Gordon* (f) were in point, and also the cases of *Mortlock v. Buller* (g), *Cudman v. Horner* (h), and *Clermont v. Tasburgh* (i).

[Several points made in the arguments on both sides and omitted here, are noticed in the judgment.]

(d) *Turn. & R.* 1. (f) 3 *Swans.* 467–473. (h) 18 *Ves.* 10.
 (e) 1 *Keen*, 672. (g) 10 *Ves.* 292. (i) 1 *Jac. & W.* 112.

The *Lord Chancellor*:—I do not feel that I can at present call upon your Lordships to come to a final conclusion upon this cause. It is a matter of great importance to the family, and involves questions of general importance as affecting proceedings in Courts of Equity: but there is one circumstance, as to which the noble Lords who are present, and myself, entirely concur, namely, that it is impossible for us to affirm the decree. We find that the issue, which is raised upon the pleadings, is proved on the part of the plaintiff (the Appellant), and disproved on the part of the defendant (the Respondent). The defendant has thought proper to tender a false defence; he has put his case upon that which is disproved by all the evidence in the cause. There can be no doubt that he must have been aware, when he executed the deed in question, and when he put in his answer, that that deed was not merely in respect of the prosecution of the commission of lunacy, but that it was a settlement of the estate, in some way at least, upon his eldest son. He has, however, thought proper to take issue with the plaintiff upon that fact; and the plaintiff, therefore, in preparing for the hearing of this cause, had only to prove his own case, and to repel the case made by the defendant, which I believe we are all of opinion he has completely succeeded in doing. It is true there are circumstances appearing upon the evidence, which the plaintiff has gone into for the purpose of proving the issue stated in the pleadings and no other, which may be said to call for explanation, but the plaintiff has had no opportunity of entering into that explanation. It was not necessary for him to go into it, because upon that subject there was no issue tendered by the defendant; it is in no part of his case stated that, although it is true he

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intended to make a settlement of this estate upon his son, with certain powers reserved to himself, there was, either by fraud or by negligence, an omission of those provisions which would have been for his benefit. There is no allusion to such a state of facts in the answer of the defendant in this cause. It was not only, therefore, not necessary, but it would have been superfluous for the plaintiff to have gone into evidence to disprove that which was not affirmed. At the same time there are circumstances which may, if investigated, show that the defendant has a case by which he might be enabled to resist a part of that, at least, which is asked for the plaintiff. I confess I have very great difficulty in permitting the defendant, after all that has occurred,—after a statement of a false issue in a contest with his antagonist,—to have an opportunity of going into the proof of another case. I think it is extremely dangerous in principle, that it would be very likely to lead to improper means of meeting a claim, and also would incur some danger of very great difficulty being felt in coming to a satisfactory conclusion upon any inquiry which might be directed for that purpose. The only doubt, however, which I have, and I believe I may say, which my noble and learned friend now present entertains upon this subject is, whether there ought to be some mode directed by which those circumstances which the plaintiff has had no opportunity upon the record, as the defendant tendered the issues to him, of explaining, should be the subject of further investigation. For that purpose it is necessary that we should take time to look into the proceedings; and in order to that, I would propose to your Lordships that the further consideration of this case be adjourned.

Lord *Wynford* :—I entirely concur with my noble and learned friend, that the issue which has been tendered by the Respondent, and which is that which therefore ought to be met by the Appellant, has been proved clearly on the part of the Appellant, and disproved as far as regards the Respondent. But still I cannot but think that there are many circumstances in this case which are not met; probably it may be from the fault of the Respondent that they were not properly brought before the Court, but it appears to me that your Lordships cannot give a perfectly satisfactory judgment unless you can find out some mode by which those circumstances may be further investigated. I quite agree with my noble and learned friend that it is an extremely dangerous thing, where a cause has been tried upon one point, to open it afterwards to the parties to inquire into other matters; but I think the danger may be avoided in this case if the objections which occur to me should, on further consideration, appear to be made out by the evidence on the part of the plaintiff. I think it will be very dangerous now to let the defendant go into fresh evidence; but if it appears on the evidence given on the part of the defendant, that a judgment in favour of the plaintiff ought to have been given, or at least one less favourable to the defendant, it appears to me that there may in such case be a further investigation; what the mode of that investigation should be, I do not know. It occurred to me at one time, and it struck my noble and learned friend, that it might be sent to an issue; but the matter is of such an extended nature that it is impossible the facts on which information is desirable can be satisfactorily ascertained by an issue. I am not familiar enough with the practice of the Court of Chancery to know what other

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mode there may be by which this matter may be investigated; but I agree with my noble and learned friend that it is highly proper, in a case of so much importance, and where I feel bound to say that I cannot quite approve of the conduct of any of the parties to these transactions, that some delay should take place for the purpose of considering whether any mode can be discovered by which the facts may be more clearly ascertained.

May 4.

While the appeal was standing for final judgment, the two Respondents presented a petition to the House stating the proceedings in the cause, and that the instructions for, and drafts of the deed, which the petitioners had not previously seen, were produced at the hearing, and the Lord Chancellor's judgment was partly founded on matters appearing in the instructions and draft, and on evidence referring to them, given on the part of the Appellants. The petitioners offered with the leave of the House to file a bill against the Appellants, to set aside the deed of *December 1827*, whereby the fullest investigation could be had into the circumstances. This petition was referred to the Appeal Committee.

May 7.

The *Lord Chancellor* :—The object of this suit was to carry into effect an arrangement between the plaintiff, *Dudley Persse*, and his father the defendant *Robert Persse*, respecting a landed estate of considerable value, which belonged to *Robert Parsons Persse*, a lunatic, to whom *R. Persse* was heir at law. By a previous arrangement of 1823, *Robert*, who was tenant for life of the family estates called *Roxborough*, with remainder to his son *Dudley*, in tail, had conveyed his life-estate to *Dudley*, in consideration of an

annuity of 800*l.* for his own life, and payment of debts which are stated to have been equal to 17,500*l.*, and a charge upon the estate of 6,000*l.* for *Robert's* younger children. The estate is represented to have produced about 4,500*l.* a-year, and the age of the father in 1823 is stated to have been about sixty-one. Much has been said as to this transaction, but the propriety of it is not in question in this cause : its validity has never been impeached, and the provisions of it are very material for the purpose of showing the relative situation of the parties in the year 1827. Before that time, that is in 1826, *Dudley* married Miss *O'Grady*, and by the settlement upon that marriage, this *Roxborough* estate was so settled that *Dudley* took only a life-estate, with remainder to his eldest son in tail, and provision was made for the wife and the younger children.

Such was the state of the family property in 1827, at which time apprehensions were suggested that unfair means might be resorted to by others to deprive the family of the succession to the estates of *Parsons Persse*, then supposed to be a lunatic, which were called the *Castleboy* estates. The lunatic was at that time about forty ; *Robert Persse*, his heir presumptive, was sixty-five, and *Dudley* a younger man than the lunatic. It is therefore obvious that *Dudley's* expectancy of succeeding as heir was much more valuable than his father's; and if he had so succeeded he would have had the estates in fee. From expressions proved to have been used by the father, it appears that the *Roxborough* and the *Castleboy* estates had formerly been united in his family, and that he was anxious that they should be reunited; but to effect that purpose it might be expedient that *Dudley* should not have the power of disposing of the *Castleboy* estate

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any more than he had of the *Roxborough* estate. The course recommended to secure the *Castleboy* estate was to sue out a commission of lunacy against *Parsons Persse*, the expense of which, though to be paid out of the estate if the lunacy were established, required an immediate advance of money, which would fall on the party suing out the commission if the lunacy should not be established. *Robert Persse*, the father, had been a bankrupt, and had no command of money. Under these circumstances the deed of covenant in question in this cause, dated the 8th of *December* 1827, was executed, the effect of which was that *Dudley*, the son, was to undertake the prosecution of the commission in the name of his father, and the *Castleboy* estate, if it should descend to the father on the death of the lunatic, was to be settled so as to give to the father an estate for life, and subject thereto upon the same trusts and purposes as the *Roxborough* estate stood settled. The commission was sued out, and the lunacy was established. The lunatic died in *October* 1829, and a will having been set up, an ejectment was brought by the person claiming under it, but upon a trial the jury found a verdict against his claim. The title of the heir being thus established, the present bill was filed to carry into effect the provisions of the deed of the 8th of *December* 1827.

With reference to the grounds upon which the prayer of that bill was refused by the Court of Chancery in *Ireland*, and upon which the decree has been supported at the bar of this House, it is of the utmost importance to consider the defence set up by the answer. That defence consisted simply in stating that the deed had been obtained by misrepresentation and fraud, not of advantage taken of the distressed

circumstances of the defendant, or of his want of legal assistance in stipulating terms for his own advantage, but by a fraudulent misrepresentation of the purport and object of the deed; the defendant deliberately swearing in his answer that he never intended to give up his expectancy of succeeding as heir to the lunatic, or in any manner to agree to settle his estate, but that the extent of his intention was to charge the expenses of prosecuting the commission upon the estate; and that he was told and believed that such was the only object and purport of it. That this defence is false in every part is proved beyond the possibility of doubt; the judgment of the Court below assumes that it is so; the instructions for the deed of *December* 1827, if known to the father, disprove it; and four witnesses, *O'Connor*, *Nolan*, *Waller* and *Richard O'Grady*, prove that the draft deed was read over to, and a copy read by, the father before he executed it; and *Richard Adams* proves subsequent recognitions of it by him. Lord *Guillamore*, the late Chief Baron of the Court of Exchequer in *Ireland*, though not actually present at the execution of the deed, was occasionally in the room when the parties met for that purpose, and he was made the depository of the deed by *Robert Persse*. If any such fraud as that sworn to in the answer was committed, Lord *Guillamore* and his two sons must have been parties to it, or, what is scarcely more credible, the author of it must have chosen to practise it in their presence. It is unnecessary, however, to observe further upon this defence, as it forms no part of the judgment appealed from, and was not relied upon at the bar by the counsel for the Respondent.

But in considering the grounds upon which the judgment was founded, and upon which the right of

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the son to the relief he prays was denied at the bar, it must not be forgotten that the defendant pleaded this defence and no other, and is therefore not at liberty to set up any other defence which depends upon matters of fact not put in issue, and which the plaintiff, therefore, has had no opportunity of disproving or of explaining. Objections to the relief prayed, which rest upon the nature or provisions of the deed itself, or upon facts common to both parties, are not open to this observation; but assuming that the father was perfectly acquainted with the contents of the deed before he executed it, to permit him to impeach it upon matters of fact not put in issue by him would be contrary to the established rules of Courts of Equity, and inconsistent with the most obvious principles of justice. Some of the grounds relied upon on behalf of the defendant are of a middle character, arising out of facts put in issue, it is true, but for a totally different purpose: such as the instructions and draft of the deed proved by Mr. O'Connor. These the plaintiff put in issue to disprove the defendant's statement, that he conceived the deed to be only a security for the expenses of the commission; but the circumstances under which those instructions were given and those drafts prepared were not put in issue; the transaction not being impeached upon any statement connected with that transaction. No opportunity therefore was afforded to the plaintiff to explain what may now seem to require explanation, or to prove additional facts where the information may appear defective. I should, therefore, have thought that any suspicions arising from so much of the transaction as was so proved in the cause, ought not to have led to any conclusion influencing the decision of the case; but as many such circumstances have

been replied upon, it may be expedient to examine how far such suspicions appear to be well founded.

It was contended that the son had taken an improper advantage of the distressed situation of his father, occasioned by the withholding his annuity. I do not find any proof of this, but, on the contrary, it appears that there was no complaint made, and no ground of complaint on that subject. The father was, indeed, in circumstances which precluded him from incurring expenses or pecuniary liabilities, but that can only be referred to his own misfortunes; and it is to be observed that this part of his case is inconsistent with another, much relied upon, namely, that the undertaking by the son to prosecute the commission was no burden upon him, and therefore no consideration for the deed, because the property of the lunatic was ample to provide for the costs. If that were so, how could the distressed situation of the father prevent him from prosecuting those proceedings himself? And where was the inability to do so, which is alleged to have been taken advantage of by the son, as a means of depriving the father of that to which he was entitled?

Another objection taken to the transaction was, that the father had no professional advice, Mr. *O'Connor* being exclusively the solicitor of the son. I think it is proved that Mr. *O'Connor* acted as solicitor for the father as well as the son, and that he was the person whom the father was so far in the habit of consulting as to make him the most natural person for him to employ upon the matter of the lunacy. The evidence of *James Blakeney*, examined by the defendant, and the letters of the 3d of *February* 1828 and the 10th of *April*, sufficiently prove this. It is true that he also acted as solicitor for the son, and was thereby placed in the difficult and responsible situation of acting for

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two clients in a matter to be settled between them ; but the objection, if any, must be that Mr. *O'Connor* betrayed the interest of his client the father, in favour of his client the son, and not that the father had not professional assistance. The ground upon which it was contended that the solicitor betrayed the interests of his client the father, rests upon the written instructions and the drafts of the deed which he produced for the purpose of proving the falsehood of the defence set up in the answer. The instructions were taken down at the meeting between the father and the son ; they certainly are very short, but they embrace the whole of the arrangement as afterwards carried out ; they provide that the father should give up his expectancy in the *Castleboy* estate, except a life-interest for himself, and that the son should prosecute the commission. This appears to have been all that was at that time settled. When the solicitor afterwards prepared the instructions for counsel, and when the counsel employed for each of the parties proceeded to prepare the draft of the deed, it naturally occurred to them to inquire whether the life-estate of the father was to be dispunishable of waste, and whether he was to have a leasing power. The absence of provisions for these purposes in the deed is not insisted upon or alluded to as an objection in the answer ; no explanation therefore could be expected from the plaintiff. That many opportunities occurred of discussing this and all other matters connected with the proposed arrangement, is proved by Mr. *O'Connor* and by Mr. *Waller O'Grady*, in whose father's house the defendant was staying ; and that additional details were arranged, after the written instructions taken by Mr. *O'Connor*, is proved by the fact, that by the deed the *Castleboy* estates were to be settled to the same uses

as the *Roxborough* estate, in which the son had only a life-estate; whereas the instructions would have given to him the fee; an alteration which it is not to be supposed the son would have consented to, if it had not been stipulated for by or on behalf of the father. What passed upon this subject, or relative to the leasing power, or of the life-estate not being dispunishable for waste, is not stated, no explanation being called for by the defence set up; but as the defendant does not complain of the deed because it does not contain such provisions, why is fraud and imposition to be assumed on behalf of a party, who, with a deed before him, as stated in the bill, does not suggest any such fraud or imposition, and against a party who has thus been deprived of an opportunity of explaining the circumstances which led to the omission of them? Incidentally however, and by accident, it is proved that the father expressed a desire that the *Roxborough* and *Castleboy* estates should be reunited in his family, which tends to explain the absence of a leasing power for any terms which could be turned to profit by the tenant for life; and that, upon being consulted whether he wished to have a power of making any provision out of the estate for any of his younger children, he answered that he did not, which explains the absence of a power to cut timber, as it may be assumed that he would have exercised such power for that purpose. It appears to me, therefore, that there were not sufficient grounds for the suspicion of unfair dealing, which have been relied upon, and that, regard being had to the matters put in issue by the pleadings, such suspicion ought not to have influenced the decision of the cause.

It was, however, open to the parties to rely upon objections appearing upon the face of the instrument

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upon which relief was prayed. These objections, though divided into many heads in the argument, may be reduced to four: first, that the contract was illegal as partaking of champerty and maintenance; secondly, that it was illegal as against public policy, and a fraud upon the great seal in the matter of the lunacy; thirdly, that there was no mutuality in its provisions; fourthly, that the covenant was voluntary, being without any, or at least without any adequate, consideration.

As to the first of these objections, the answer is obvious: there was no suit to be maintained, and no property in litigation to be divided.

Upon the second objection, no case was cited; and I have not been able to understand how an arrangement between parties expecting property upon the decease of a lunatic, can be a fraud upon the great seal in the matter of the lunacy, or, upon that ground, void as against public policy. The thing to be looked to in matters of lunacy, is the protection of the person and property of the lunatic, and for that purpose the encouragement to parties to interfere and to bring the facts before the Court. It is obvious that this object would in many cases be impeded, rather than promoted, by holding that all agreements relative to the costs of the proceedings, or the ultimate division of the property, were void. I have not any principle or authority cited, in support of this objection. Agreements as to expectancies have been enforced in equity, which appeared to be open to serious objections which do not apply to the present case.

In support of the third objection, that there was no mutuality in the contract, some well-known cases were cited; but the question here is, whether, after the risk incurred, and the benefit secured, and the

consideration thereby paid, the father can, on his part, resist the performance of the contract which led to those results? If this objection could prevail in this case, how could decrees for specific performance, where the defendant only signed the agreement, or upon part performance, be maintained? In those cases there is no mutuality in the sense in which the word is used in the present argument, because the contract being within the Statute of Frauds could not have been originally enforced against the plaintiff; but he having performed his part, is entitled to compel the defendant to perform his.

Fourthly, the supposition that the covenant was merely voluntary is negatived by the defendant's own statement of the case; for beyond all question some consideration proceeded from the son. The object of having a commission of lunacy prosecuted, the father's inability to undertake it from whatever cause proceeding, and the fact of the son's having taken upon himself the prosecution of it, are facts common to both parties, and show that the covenant was not merely voluntary; leaving the question to be considered how far it can be objected to upon the ground of the consideration being inadequate. The situation of the parties and the properties in question, appear to me to afford a complete answer to this objection. The son was in possession of the family estate, but as tenant for life only; from the relative ages of the father and of the son, and of the supposed lunatic, the probability was much in favour of the son, by the death of his father before the lunatic, succeeding as heir to whatever estate might descend from him; but there was a strong apprehension, and, as the event proved, a great probability that without

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active measures to counteract the fraudulent projects of others, no part of the lunatic's estate would descend to either of them. It may well be supposed to have been an object of the father, who is proved to have been anxious for the re-union of the two estates, that the lunatic's estate should be settled in the same manner as the family estates. The agreement with the son effected all that could be done to secure the lunatic's estate to the family, and, if it should descend to the father, secured its re-union with the family property. By what scale of money consideration are these objects to be estimated? The impossibility of estimating them, has led to the exemption of family arrangements from the rules which affect others. The consideration in this and in other such cases is compounded partly of value and partly of love and affection. The ages of the parties made the father's expectancy of but little value; but if he had been certain of himself succeeding as heir to the lunatic, his own personal use of the estate would probably have been confined to a life-interest. This, in ordinary cases, would have been the natural course, and not likely to be departed from where the father had expressed his anxious wish that the two estates should be held together. But there were several younger children unprovided for, and it is assumed that the father must have desired the dominion over the estate for the purpose of making some further provision for them. Experience does not prove that the wants of the younger children generally induce fathers to deprive the eldest son of much of the inheritance; but, in this case, it is proved that upon being distinctly asked the question, he answered, that he did not wish to have any power over the estate for that purpose. If this be true,—and it is sworn to by

two witnesses,—the absence from the covenant of any power to make leases and to cut timber is very much explained. There is no allegation or proof that it was part of the agreement that the father should have such powers. The omission of these powers forms no part of the father's case; but if the contract be otherwise binding, is the absence of such powers in an arrangement between a father and son such cogent proof of imposition as to invalidate it? The arrangement of 1830 is open to the same objection, and I cannot but consider the parties interested under that settlement as the real defendants in this case. The father appears to have but little, if any, interest in the contest. That arrangement of 1830 took place with sufficient notice of the previous arrangement with the eldest son, and therefore cannot prevail against it, if such prior arrangement was in itself binding.

Being of opinion that the objections stated to this arrangement are not available for the purpose of depriving the Appellant of the benefit of it, I am also of opinion that he is entitled to have it completed by a decree; and as the timber has been cut with full knowledge of the Appellant's title, and in defiance of the father's covenant, I think it impossible to deny to the Appellant the account he prays upon that subject. I think also that the decree below ought to have been made in his favour with costs. There can be no costs of the appeal.

Lord *Wynford*:—In wading through these very long pleadings, I should have thought there were many important questions which were submitted to your Lordships' consideration, but that can make no difference in the conclusion to which I shall come; because I am decidedly of opinion, upon a view of the

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whole case, that the judgment which my noble and learned friend has advised your Lordships to give is a correct judgment. There certainly are many points in the case which were touched upon by the counsel at the bar, which are not raised by the pleadings. I think your Lordships cannot, with propriety, take any notice of those, as nothing can be more dangerous in the administration of justice than to allow your decisions to be affected by matters which are not pleaded. If the attention of the opposite party had been called to such points, he might have given a denial or a satisfactory explanation of such matters, which, by the course of pleading, he has been prevented from doing. The Court would, therefore, if it decided on those matters, be deciding on matters which it has been prevented from fully and satisfactorily hearing.

The points which are not adverted to in the pleadings are, *first*, that the Respondent was not told that it was not necessary that he should take out a commission of lunacy, as it was competent to any other person to take it out; *secondly*, that he was not told that, if he succeeded, he would be paid out of the estate costs taxed as between attorney and client, that is, the whole of his expenses; *thirdly*, that the consideration was not sufficient to support the conveyance. It might be observed that the only consideration that was at first introduced, was that of natural love and affection, and it was not until after it was discovered that the consideration did not prevent a subsequent conveyance from getting rid of it, that any other consideration was introduced. But this is an objection that should not be made unless it be specifically pointed out by the pleadings. Now, the sufficiency of consideration depends on many circumstances, which

may be proved by evidence, if the attention of the opposite party had been called to them. The deed of 1830, by which this conveyance is attempted to be set aside, is liable to great suspicion ; it seems to be only colourable ; the price is only eight years' purchase, and that is not to be paid till after the purchaser has got possession. The fourth objection is, that the conveyance was obtained by maintenance and champerty ; the fifth, that the life-estate was made unimpeachable of waste, and that no power of leasing was given to the tenant for life.

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The two questions, as it occurs to me, on the determination of which your Lordships' judgment should depend are, first, was the Respondent deceived by being prevailed upon to execute a deed, which conveyed *Parsons Persse's* estate absolutely to the Appellant, which deed he was made to believe was only a security upon the estate for the expenses that the Appellant was likely to incur by taking out and prosecuting the commission of lunacy against *Parsons Persse* ? In support of this objection, the Respondent urges that the deed was prepared by the Appellant's attorney, a person whom he had never employed, and that it was executed at Lord *Guillamore's* house, who was the Appellant's father-in-law, in which the Respondent, who had never visited Lord *Guillamore* before, had resided for a fortnight, surrounded by his Lordship's family. It is not true that the Respondent had never employed the attorney before ; he had employed him many years ago when Respondent was a bankrupt, and he had since been employed by the Respondent's man of business ; and the Respondent must have known that, for he must have paid the attorney's bills for the business that was then done. On this occasion the attorney was employed by the

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Appellant, who sent the attorney to the Respondent to prevail on him to sue out a commission against *Parsons Persse*. He persuaded the Respondent to visit the Appellant, and the Appellant succeeded in getting him to go to *Dublin* to give instructions for the commission of lunacy and for this deed. As the Respondent had never before partaken of the hospitalities of Lord *Guillamore*, it would have been more delicate in the Appellant not to have taken the Respondent to his Lordship's house on this occasion. But are these circumstances to disturb a solemn deed? yet these are all which the Respondent can bring forward. On the other hand, there are many witnesses of great respectability who prove that the Respondent himself gave instructions for the deed; that it was read over to him at the time of its execution; that he expressed his intention to execute such a deed before it was executed, and declared that he should do this to unite the two estates in the same person; and that, after the deed was executed, he told another gentleman that he had executed such a deed, and declared he had done it with the same object as that which he had mentioned to the gentleman to whom he had said that he would make such a disposition. Whatever circumstances of suspicion may hang about it, one can scarcely conceive a stronger case. *O'Connor* has sworn that he took the instructions for the deed from the Respondent's own mouth: those instructions, although departed from in some respects, were to prepare a conveyance of the estate to the Appellant for his own use, and were not authorising him to prepare a security for the expenses to be incurred. *O'Connor*, the two *O'Gradys*, and *Nolan*, swear that the deed was distinctly read over to the Respondent before it was executed by him. This is confirmed by

Adams and *Lambert*, one of whom swears that the Respondent spoke to him before the deed was executed, of his intention to unite the two estates, and the other swears that some time after the deed was executed the Respondent told him that he had executed a deed by which he had provided for the union of these estates.

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The second question that it appears to me is raised by the pleadings, as I have already stated, is perfectly immaterial with respect to the judgment on the case. Did the Respondent execute the deed under the pressure of distress which the Appellant had occasioned by the nonpayment of the annuity payable to him by the Appellant out of the *Roxborough* estate? Considering the amount of that annuity, compared with the rental of the estate out of which it was to be paid, and that the Respondent had only this annuity to subsist upon, I cannot find sufficient excuse upon the evidence for the irregularity with which it was paid. But this defence is inconsistent with the case before made by the Respondent: he was not likely to be induced by distress to execute a deed which was to provide for the security of money to be expended for a purpose beneficial, although not in any equal degree, to both parties. A man under the pressure of distress may execute deeds to obtain the means of supplying his present wants, but not to provide for any remote advantage. The hope of advantage here was very remote indeed: as *Parsons Persse* had by will given his estate from this branch of the family, and as it was so difficult to get him found a lunatic that one jury summoned to try that question had been discharged without finding a verdict, I do not think there was any great probability that it ever would have been realized. I cannot think that your Lordships can say that this deed was

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executed under the influence of distress. Whether the execution of that deed were a wise act on the part of the Respondent or not, I think it was executed by him with a full knowledge of what he was doing, and for the attainment of the object that he stated to *Adams* and *Lambert* he had in his contemplation when he executed it ; and I cannot conceive that the straitness of his circumstances could have contributed to influence him to make that conveyance. I am therefore of opinion that the appeal should be allowed, the decree of the Court below set aside, and the directions proposed by my noble friend should be given.

Ordered that the decree be reversed : *Declared* that the Appellants are entitled to the benefit of the indenture of the 8th of *December* 1827, and of the covenants and agreements therein contained ; and that the indenture of the 9th of *June* 1830 is to be considered as fraudulent and void, so far as it affects or interferes with the indenture of *December* 1827 ; And *ordered* that, with this declaration, the cause be remitted to the Court of Chancery in *Ireland*.

GEORGE CREIGHTON - - - - - *Appellant.*

ROBERT RANKIN - - - - - *Respondent.*

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ON the true construction of the general Turnpike Road Acts for *Scotland* (4 G. 4, c. 49, and 1 & 2 W. 4, c. 43), the clerk appointed by trustees of district roads under a local Act, may, as their representative, sue and be sued on their account in his own name; and he is the proper person to bring an action against their treasurer's sureties for payment of balances due from the treasurer. (*Williamson v. Goldie* questioned, *infra*, p. 342.)

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Construction.
Title to sue.
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Quære, whether the trustees can authorise their clerk so to sue or defend, independently of the statutory provisions? For, if by the rule of practice in the *Scotch* Courts (which constitutes the law of *Scotland*, and therefore is not to be disturbed on appeal, without full inquiry into the grounds of it), a party having himself a right to sue, can enable another to maintain a suit in such other person's name, without assigning to him the subject-matter of the suit, consequences inconsistent with the principles of justice would flow from such practice. (*Infra*, p. 343.)

HELD (affirming the judgment of the Court of Session) that a defender whose name has been omitted *per incuriam* from the conclusions of the summons, is not to be permitted to have recourse to that omission as a fatal objection to the whole process, after his defences preliminary and on the merits have been repelled. The defect was cured by the acts and acquiescence of the defender and of his representative sisted in his place. (*Infra*, p. 344.)

The treasurer appointed by district-road trustees having absconded with the trust funds; HELD (affirming the judgment of the Court below) that a cautioner for the faithful discharge of his office was liable to the trustees for the balances due from the treasurer, although at several prior audits of his accounts they were guilty of neglect of their duty, by allowing him to retain in his hands balances far exceeding the amount allowed by the terms of the bond of caution, without requiring payment and without notice to the cautioner.

The rule as to the liability of sureties in a bond is the same in *Scotland* as in *England*, viz. that they are not to be discharged from their obligations unless the contract between them and the obligees is varied by a positive contract between the obligees and the principal, without notice to the sureties. It is the duty of a surety to see that his principal performs his obligations. (*Infra*, p. 346.)

THE actions in which this and another appeal (hereinafter mentioned) between the same parties originated,

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were raised before the sheriff of *Ayrshire*, and afterwards by advocacy brought before the Court of Session. The claim made was resisted upon certain objections (after noticed) to the title of the Respondent to pursue, and to the regularity of the proceedings, and also upon the merits.

The facts, as to the present appeal, were these:—The subsisting Road Act for the county of *Ayr* (*a*) was passed on the 21st of *June* 1827, and at the first meeting of the county trustees, held at *Ayr* on the 11th of *July* following, authority was given to the committees appointed for the management of the different lines of road under a former Act, “to continue the management of the turnpike roads connected with their districts under the present Act, until the first *Wednesday* in *August* next, taking along with them the new trustees appointed by the present Act, having interest in the parishes through which the particular lines of road pass, and to recommend to the former conveners to call meetings for the purpose of appointing clerks, cashiers and collectors,” &c. By virtue of that authority, a meeting of the trustees for the district of *Lochlibo* was held at *Beith* on the 27th of *July*, when *Robert Rankin*, junior, was appointed treasurer of roads in that district; and on the 2d of *August*, he and his cautioners executed a bond, which, after reciting the new Act, and the election of the treasurer, &c., proceeded thus: “We, *R. Rankin*, junior, as principal, and *Robert Dunlop* and *Patrick Creighton*, as cautioners, bind and oblige ourselves, jointly and severally, and our heirs and executors,

(*a*) 7 & 8 G. 4, c. cix.:—“An Act for repairing and keeping in repair the turnpike roads in the county of *Ayr*; for making and maintaining certain new roads; for rendering turnpike certain parish roads, and for regulating the statute labour in the said county.”

that I, *R. Rankin*, junior, shall not only duly and faithfully execute the said office of treasurer, but also from time to time, &c. hold just count and payment to the said trustees, or a *quorum* of them, of my intromissions with the funds of the said road, and any other road that may be put under the management of the said committee, and of all monies that shall be paid over to me as treasurer, &c.; and particularly that all monies to be received by me shall be lodged in bank, &c., and that I shall at no time keep in my hand more than 20*l.* for answering contingencies. All this under the penalty of 200*l.* sterling.”

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At a general meeting of the county trustees, held at *Ayr* on the 1st of *August* 1827, the permanent appointment of trustees for the care of district roads took place, and among others, the *Lochlibo* district trustees were appointed to take charge of three roads: 1, the *Lochlibo* road; 2, an intended road from *Lochlibo* to the road between *Ayr* and *Irvine* (not yet made); and 3, the *Monkredding* road, which was made in 1828; so that the treasurer of the *Lochlibo* road was also treasurer of the *Monkredding* road funds.

In *June* 1833, *R. Rankin*, the treasurer, absconded, taking with him funds belonging to the *Lochlibo* road, amounting, as ultimately ascertained, to 367*l.* 6*s.* 8*d.*; and at a meeting of the district trustees, held on the 14th of *June* 1833, it was resolved “to instruct *Robert Rankin*, their clerk (the Respondent), to take such measures, judicial or otherwise, as might be necessary for obtaining possession of the books and other papers belonging to the trust, which were under charge of the treasurer, and to uplift and discharge the balances due by him to the trust, and, if necessary, to sue him and his cautioners for any defalcation.”

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Under that authority, the Respondent, on the 6th of *July* 1833, raised an action before the sheriff of *Ayrshire* against the treasurer, and the said *Patrick Creighton*, and Mrs. *Dunlop*, relict, and *Jean Dunlop*, daughter of the other cautioner, who was then deceased. The summons, after setting forth the title of the pursuer, as "Clerk to the Committee of Road Trustees for the *Lochlibo* District, as representing the said Committee, and duly and specially authorised by a general meeting thereof, held at *Beith*," &c., narrated the appointment of the treasurer, the bond by him and his cautioners, and the fact of his having absconded without accounting for the funds in his hands ; and that the pursuer, in the name of the said committee of trustees, had often requested the said *R. Rankin*, junior, as principal, and *Patrick Creighton*, and the said other defenders, as cautioners, to hold just count, &c. with the pursuer, for said trustees, of the said *R. Rankin's* intromissions with the funds of the different lines of road within the *Lochlibo* district, and of all other monies paid over to him as treasurer foresaid," &c. The conclusions of the summons, by an error, omitted the name of *Patrick Creighton*, and were to this effect : that the said *R. Rankin*, junior, as principal, and Mrs. *Dunlop* and *Jean Dunlop*, representatives of *R. Dunlop*, as cautioners defenders, should be decerned jointly and severally, &c. to produce *R. Rankin* junior's accounts of his intromissions as treasurer ; that " the said defenders, as principal and cautioners foresaid," should be decerned, jointly and severally, to pay the pursuer, for behoof of the said committee of trustees, so much as should appear to be due from the said treasurer to the said committee ; and that " the said defenders, as principal and cautioners foresaid," should be decerned in like manner to pay the penalty

of 200*l.*, stipulated in the bond, for having unfaithfully executed the affairs of the trust.

To this action *Patrick Creighton* alone entered defences, raising various objections; 1st, to the Respondent's title to pursue; and 2dly, to his claim on the merits, on the ground that the trustees had, by neglecting their duties, discharged the defender from all obligations of his bond. He did not at all notice the omission of his name from the conclusions of the summons. The pursuer, however, in order to rectify the error, raised a supplementary action, concluding regularly against the defender, *Patrick Creighton*, as against the other defenders. *P. Creighton*, after taking objections to the competency of this action, made the same defences to it that he had made to the original action.

The sheriff, by an interlocutor of the 24th of *June* 1834,—adhered to by an interlocutor of the 29th of *July*,—repelled the preliminary defence as to the Respondent's title to pursue, remitted the supplementary to the original action *ob contingentiam*, and found that the trustees, or those appointed by them, in terms of the bond, were entitled to call the defenders to account.

At that stage of the cause *Patrick Creighton* died, and the Appellant desiring to be sisted as a defender in the cause, the sheriff, by an interlocutor of the 24th of *March* 1835, sisted him as defender in room of his deceased brother, and transferred the action against him accordingly, and ordered the parties to give in mutual condescendences. A record having been accordingly made up on condescendences and answers, the sheriff, by an interlocutor of the 15th of *December* 1835,—adhered to by two interlocutors of the 19th and 26th of *January* 1836,—“ Finds it averred

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by the pursuer, and not denied by the defender, that the treasurer's accounts were regularly and yearly lodged with the pursuer, as district-clerk of the road trustees, from the treasurer's appointment in 1827, until the year previous to his elopement in the end of *May* or beginning of *June* 1833; and that the same were examined and docketted by the trustees, and afterwards by a committee appointed by the general meeting, by whom the same were passed from year to year: Finds that the cautioners were bound with the treasurer, that he should not only duly and faithfully execute the said office of treasurer," (the interlocutor stated the extract of the bond before set forth): "Finds, therefore, that it was the duty of the cautioners to see that the said *R. Rankin*, junior, duly and faithfully executed the duties of his office of treasurer, by accounting for his intromissions, and complying with the terms of the bond which they came under: therefore, repels the defences for the defender, *George Creighton*, as to his liability as the representative of the original cautioner and defender, *Patrick Creighton*."

By another interlocutor of the 15th of *March* 1836, the sheriff decerned against the defenders, *R. Rankin*, junior, as principal, and *George Creighton*, as cautioner, jointly and severally, for payment of the sum of 367*l.* 6*s.* 8*d.* sterling, in terms of the state produced, with interest thereon, as libelled: "Finds them also liable in expenses of process" (which were found by another interlocutor of the 4th of *April* to amount to 16*l.* 16*s.*): "Finds the defender, Mrs. *Dunlop*, as executrix to her husband, only liable for the amount confirmed to the general body of her husband's creditors, after deduction of all preferable claims; and *quoad ultra*, assoilzies her and *Jane Dunlop* from the conclusions of the action."

The Appellant, by letters of advocacy, brought these nine interlocutors under review of the Court of Session. In the condescendence and case presented by him to that Court, founding his defence (under reservation of the preliminary defences before stated) on the alleged improper conduct and neglect of the committee of road trustees, he set forth, *inter alia*, the 17th and 18th sections (*b*) of the late general Turnpike Act for *Scotland* (4 *G.* 4, c. 49, the provisions of which are re-enacted by the corresponding sections of the existing general Turnpike Act, 1 & 2 *W.* 4, c. 43, and extended to all Turnpike Acts in *Scotland*), the 22d section (*c*) of the local Turnpike Act (7 & 8

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(*b*) The 17th section enacts, that “ All such officers as shall be appointed by any trustees of any turnpike road, shall, as often as required by the trustees, render and give to them, or to such person as they shall for that purpose appoint, a true, exact, and perfect account in writing under their respective hands, with the proper vouchers, of all monies which they shall respectively, to the time of rendering such accounts, have received, paid, and disbursed by virtue of this or any turnpike Act, or for or on account, or by reason of their respective offices ; and in case any money so received by any such officer shall remain in his hands, the same shall be paid to the trustees, or to such person as they shall in writing under their hand authorise and empower to receive the same,” &c.

The 18th section enacts, “ That the trustees of every turnpike road shall and they are hereby required, either by themselves or some committee of their number, annually to examine the vouchers and audit and settle the accounts of the respective clerks and treasurers appointed by them, and to examine into the state of the revenues and debts of the several roads for which they act, and to make up abstracts of such accounts, which abstracts shall contain a statement of the revenues and debts of the trust, and also an account of all bonds given by the trustees, and the dates thereof,” &c.

(*c*) That section enacts, “ That the trustees who shall be appointed for the special care and management of any district, or particular roads, shall be subject to the control of the general meetings of the trustees appointed by this Act, for their proceedings in the matters committed to them, and shall be accountable to the said general meetings for their intromissions with the revenues and management of the affairs of such district or road ; and for these purposes they shall, on or before the 31st day of *July* yearly, transmit to the

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G. 4, c. cix.), and various reports and resolutions of the general meetings of the road trustees, enjoining on the district trustees the most rigid adherence to their orders for the regular production and annual auditing of the accounts of the different treasurers; and insisted that the road trustees for the district of *Lochlibo*, constantly, since the date of the bond of caution, acted in violation thereof, and of the said Acts of Parliament, reports and resolutions, and evinced gross negligence and remissness in reference to the intromissions and accounts of their said treasurer, and allowed him to retain in his hands large sums of money, without any intimation to the cautioners, so as to discharge them from the obligations of their bond.

As instances of the negligence imputed to the district trustees, the Appellant stated two occasions on which they allowed the treasurer's accounts of one year to run into the next as far as the middle of *June* or beginning of *July*, instead of settling and closing them on the 26th of *May*, as required by the 22d section of the local Act; and as to sums left by them in the treasurer's hands, he averred that the balance due by him on the accounts for the *Lochlibo* road, on the 13th of *June* 1828, the day on which his accounts were examined for that year, was 119 *l.*, of which there was then only 20 *l.* in the bank, so that 99 *l.* were allowed to remain in his hands; and on the 4th of *July* and 22d of *December* of the same year, on which days there were meetings of the trustees, they

clerk of the general meetings a state of the revenues of such district or road, and of the expenditure thereon, and an account of all other transactions for the year ending on the 26th day of *May* preceding; also a list of all debts affecting the same; in order that the same may be laid before the general meeting on the first *Wednesday* of *August* yearly, under a penalty not exceeding 5 *l.* sterling."

allowed 110*l.* at the former date, and 103*l.* at the latter, to remain in his hands, instead of 20*l.* as allowed by the bond of caution, and without any notice to the cautioners. Going through the accounts, as appeared by the treasurer's books in each year, from *June* 1828 to the 15th of *February* 1833, the Appellant showed that the balances allowed to remain in the treasurer's hands varied from 100*l.* to 264*l.*; and that on the 4th of *June* 1833, when the trustees met after the treasurer absconded, the sum then declared to be due from him was 367*l.* 6*s.* 8*d.*

The following pleas in law were entered for the Appellant.—*First*, as to the objections before noticed, to the competency of the action: “1. The Respondent had no title to sue as clerk to district road trustees; it is only the clerk or treasurer to the general road trustees of the county that is authorised to sue and be sued for behoof of or as representing his constituents (1 & 2 *Will.* 4, c. 43; *Williamson v. Goldie*, 2 *March* 1832, 10 *Sh. & D.* 413). 2. The directions which a meeting of the committee of the district road trustees are said to have given to the Respondent, merely amounted to an authority to bring an action otherwise competent and legal, and did not vest any right or title in the Respondent himself to pursue at his own instance.” *Secondly*, as to the objections to the omission in the conclusions of the original libel: “1. There were no *termini habiles* for pronouncing decree against the advocator under the conclusions of the original action. 2. The supplementary action afterwards brought by the Respondent had not the effect of making the advocator a party to the original action, or of validating the procedure against him, in respect these actions never were conjoined.” *Thirdly*, as to the merits, and that the cautioners were

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KIN. liberated from the obligations of the bond: “ 1. In respect that the trustees who took the security, violated their duties towards the cautioners under the bond, statutes, resolutions and directions of the general road trustees; 2. In respect of their gross negligence and connivance with the principal debtor in retaining the trust funds; and 3. In respect of their not having intimated the omissions of the principal debtor to the cautioners, till long after the principal had absconded.”

The Respondent, in his answers and case, set forth several sections of the general Turnpike Act for *Scotland* (the effects of which are before stated in part, and again by the Lord Chancellor in his judgment), and of the said local Act; and showed, as to the state of the treasurer's accounts, that although large balances of the *Lochlibo* road funds appeared to have been in his hands from time to time, there was owing to him at the same time, up to *May* 1831, large sums in respect of his advances for the *Monkredding* road, which was under the *Lochlibo* trust, but had no funds of its own. From *May* 1831 to *June* 1832, he admitted that the balances on both lines of road were against the treasurer, viz. 203 *l.* in *May*, 1831, 145 *l.* in *May* 1832, and that the balance against him increased, in the year previous to his absconding, to 355 *l.*, while the state of his accounts did not come before the trustees. His embarrassments or defalcations were not known to them, and it was the duty of the cautioners to look to his circumstances. It was unnecessary to give them notice of the balances against the treasurer, as they might have easily learned how matters stood, the accounts being, by the 23d section of the local Act, open in the treasurer's hands to the inspection of all persons interested.

The following pleas in law were entered for the Respondent. *First*, as to the objections of form:—
 “ 1. The title to pursue libelled on in the summons is unexceptionable, and was justly sustained by the sheriff; the more especially having regard to the terms of the bond upon which the action is laid, and the provisions of the Road Acts referred to in the pleadings. 2. The decree pronounced on the merits against the advocator was in all respects regular, and no well-founded objection exists to that decerniture, either upon the ground of want of conjunction of the supplementary with the original process, or upon any other formal or technical ground. 3. The supplementary action having been remitted to the original action *ob contingentiam*, and having been thereafter held and recognised by the parties as part of the proceedings in the cause, and more especially the advocator’s predecessor having pleaded on the merits, and gone to issue with the pursuer, and the advocator himself having afterwards sisted himself as defender in room of his brother deceased, any objection otherwise competent, on the ground of there having been no formal conjunction of the actions, is not now pleadable by the advocator. 4. There are not *termini habiles* for the objection that the supplementary summons was asleep before decree was pronounced; *Ferrier v. Ross*, 7th March 1833; 11 Sh. & D. 531.” *Secondly*, as to the merits:—“ 1. The advocator was justly held liable for the intromissions of the treasurer with the road funds, to the extent found by the sheriff’s interlocutors, which are in all respects well founded. 2. No sufficient or relevant defence in law has been stated or exists to liberate the advocator from his obligation, as representing his brother the original defender, on the

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ground of violation of duty, negligence, want of due intimation, or *mora*, on the part of the trustees."

The Lord Ordinary (*Jeffrey*), on considering the cases, the 12th of *May* 1837, reported the cause to the Second Division of the Court, stating his own opinion in a note on the points raised in the pleadings (c). The Lords of the Second Division, by an interlocutor of the 18th of *January* 1838, "repel the objection to the title of the pursuer, and the other objections stated by the advocator to the regularity of the proceedings in the inferior Court: and on the merits, before answer, allow the advocator within eight days to lodge a minute, and state in figures the amount of the balance at the last audit of the treasurer's accounts in the year 1832; and allow the Respondent to answer the same, if necessary, within eight days thereafter (c)."

In obedience to that interlocutor, a minute was given in, on behalf of the Appellant, of the balance of the funds in the treasurer's hands at the last audit of his accounts in 1832-33; and an answer thereto on behalf the Respondent: and the cause having been again considered by the Court, along with that minute and answer, their Lordships, on the 6th of *February* 1838, pronounced the following interlocutor:—"The Lords having advised the cases for the parties, and the whole process, and heard counsel for the parties, repel the reasons of advocacy, adhere to the interlocutor of the sheriff submitted to review, remit *simpliciter* to the sheriff, and decern; find expenses due; allow an account to be given in, and remit the same when lodged to the auditor to tax and report."

(c) See the judgments and the Lord Ordinary's note, 16 Dunlop B. & M. 454.

The auditor having afterwards taxed the costs and reported, their Lordships, by an interlocutor of the 9th of *March* 1838, approved of the report, and decerned for payment thereof.

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The present appeal was against the sheriff's nine interlocutors before stated, and against these three interlocutors of the Court of Session.

The *Attorney-general* and Mr. *Anderson*, for the Appellant, in support of the objection to the Respondent's title to bring the action, cited, among other cases, *Crawford v. Mitchell*(*d*), *Lawson v. Gordon*(*e*), *Wilson v. Kippen*(*f*), and *Williamson v. Goldie*(*g*), in which last case it was held that the 16th section of the general Turnpike Act authorised the clerk of the general trustees, and not the clerk of district trustees, to sue or be sued.

In support of the objection, that as the summons in the action did not in its conclusion mention the name of the defender, *Patrick Creighton*, whom the Appellant represents, the action and all the proceedings in it failed altogether, they referred, among other cases, to *Wedderburn v. Town of Dundee*(*h*), and distinguished the present case from that of *Boyd v. Lang*(*i*), which was cited against the objection by the Lord Ordinary in the Court below.

On the merits, they submitted that the sureties were discharged from the obligations of their bond by the acts and omissions of the trustees, on three principal grounds:—*first*, that the trustees so conducted themselves as to alter the condition and risk of the cautioners, as stipulated or contemplated when the bond

(*d*) Morr. 1958.

(*e*) Fac. Coll. 7 July 1810.

(*f*) 2 Shaw & D. 378.

(*g*) 10 Shaw & D. 413.

(*h*) Morr. 11986.

(*i*) 10 S. & D. 213.

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of caution was granted; *secondly*, that they violated or failed to observe the duties and obligations made incumbent upon them by the Road Acts, and which formed conditions precedent to the enforcement of the cautionary obligation; and, *thirdly*, that they not only suffered the treasurer to act in opposition to the rules and regulations of his office, but connived with and encouraged him in their violation, and otherwise conducted themselves towards him with gross negligence: and in support of these propositions they cited the *English* cases of *Montague v. Tidcombe* (*k*), *Stratton v. Rastall* (*l*), *Eyre v. Bartrop* (*m*), *Bowmaker v. Moore* (*n*), *Bacon v. Chesney* (*o*), *Smith v. Bank of Scotland* (*p*); and the following among other *Scotch* cases: *University of Glasgow v. Earl of Selkirk* (*q*), *Dick v. Nisbet* (*r*), *Pringle v. Tate* (*s*), and *Fell on Guarantees*, p. 180; and they distinguished this case from that of *Mactaggart v. Watson* (*t*), the decision of which by this House they submitted was not adverse to the Appellant's case.

The *Lord Advocate* and Sir *W. Follett*, for the Respondent,—After referring to the terms of the bond, and to the provisions of the Road Acts, contended that the title of the Respondent to institute the action, as clerk of and representing the committee of road trustees, was beyond all exception; *Wilson v. Kippen* (*u*), *Low v. Lord Arbuthnot* (*x*), *Oswald v. Lawrie* (*y*), and *Gemmels v. Barclay* (*z*).

With respect to the objection of form to the omission

(*k*) 2 Vern 578.
 (*l*) 2 T. Rep. 366.
 (*m*) 3 Madd. 221.
 (*n*) 7 Price, 223.
 (*o*) 1 Starkie, N. P. C. 192.
 (*p*) 1 Dow, 296.
 (*q*) Morr. 2104.

(*r*) Morr. 2090.
 (*s*) 12 Shaw & D. 918.
 (*t*) *Ante*, Vol. III. p. 525.
 (*u*) 1 Sh. & D. 304.
 (*x*) 4 Sh. & D. 651.
 (*y*) 5 Sh. & D. 381.
 (*z*) 9 Sh. & D. 33.

of the original defender's name from the conclusion of the summons, they submitted that the supplementary summons cured that defect, and that the Appellant was at all events precluded by his acts and acquiescence from taking that objection, after, by his own desire, he was sisted as defender in the action, and proceeded with his defences preliminary and substantial to a decree against him.

On the third point, they submitted that there was no sufficient ground on the merits, regard being had to the facts of the case, to discharge the Appellant from the obligations of the bond. Their line of argument on this part of the case was the same as that which the Lord Chancellor pursues in moving the judgment of the House on the case. They cited *Nares v. Rowles* (a), *The Trent Navigation Company v. Harley* (b), *Eyre v. Everett* (c), and *Mactaggart v. Watson* (d).

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THE second appeal was between the same parties, against interlocutors pronounced in a similar action brought by the same pursuer, as "Clerk of the Committee of Road Trustees for the district of *Irvine*, and as representing that Committee," for recovering a balance of 325*l.* due for the intromissions of the said *R. Rankin*, junior, who had been appointed treasurer by that committee, in *July* 1827, over three lines of road within their district, viz., the *Kellybridge* road, the *Girdle* road, and the *Stewarton* road; and a bond of caution, with the same sureties in the same terms as were contained in the bond given by them to the *Lochlibo* district trustees. This action was also brought before the sheriff of *Ayrshire*, went on simultaneously with the former, similar defences were made, and

(a) 14 East, 510.

(b) 10 East, 34.

(c) 2 Russ. 381.

(d) *Ante*, Vol. III. p. 525.

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similar interlocutors were pronounced, both before the sheriff and upon advocacy before the Court of Session; against all which the Appellant appealed.

The same counsel, on both sides, argued this appeal on the 18th of *May*.

May 26.

The *Lord Chancellor*:—The pursuer in this case is described in the summons as “Clerk of the Committee of Trustees of the *Lochlibo* District,” and “as representing the said Committee, and duly and specially authorised by a general meeting thereof.” If, therefore, the pursuer can maintain his title to pursue, in either character, the first preliminary objection must fail. Lord *Jeffrey*, the Lord Ordinary, was inclined to support the pursuer’s title upon both grounds (*e*). I do not understand the other Judges to have expressed any opinion upon the first ground, viz., the title to pursue under the statute (*f*). This is to be regretted, as both points are of considerable importance and of general application.

I have thought it my duty to look into that statute, now the general Road Act for *Scotland*, for the purpose of forming my opinion. The 9th section authorises trustees, acting under any Turnpike Act, to divide the roads comprised in such Act into districts, to name committees of their number for the more immediate direction and management of such roads, or particular parts thereof; and the regulations in former sections enacted are to apply to and to affect all such committees. The 11th section of the former statute (4 Geo. 4, c. 49), gives to the trustees, in their district or committee meetings, full power to appoint clerks and

(*e*) 16 D. B. & M. 453.

(*f*) 1 & 2 W. 4, c. 43, s. 16.

collectors and treasurers, with salaries; but the 10th section of 1 & 2 W. 4, c. 43, gives the power to trustees acting under any Turnpike Act, in which the district committees clearly are included; and the 11th section of that Act directs the trustees of every turnpike road to take security from every treasurer to be appointed by them. By the 10th section the district trustees are to appoint a treasurer. The security directed by the 11th section must be given by the treasurer, so to be appointed, to the district trustees, who are so to appoint him. The 13th, 14th, and 15th sections, contain regulations for the conduct of the trustees, in which they are described as "trustees of every turnpike road;" and the 16th section, using the same description, enacts that the trustees of every turnpike road may sue or be sued in the name of their clerk or treasurer, and provides that his costs shall be paid out of the trust funds of the road for which he shall act. The 17th section provides that all such officers as shall be appointed by the trustees of any turnpike road shall account with them, and in default the sheriff is to act on the application of the said trustees; and by the 18th section, the trustees of every turnpike road are by themselves, or some committee of their number, annually to examine, settle and audit the accounts, and make abstracts of them.

The result of those several provisions of the general Act appears to me to be, that when the road under any Turnpike Act is divided into districts, and a part assigned to a committee of the trustees, that committee are the trustees for the purposes of that part of the road so assigned, and as such have all the powers and authorities given by the Act, though subject to the direction and control of the general body of trustees; and that they have the power of appointing the clerk

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and treasurer of such road ; that they are to take security from such clerk and treasurer ; and that the clerk so appointed is, under the 16th section, when necessary, the proper person to sue upon the security so given by the treasurer to such committee of trustees. I certainly am not able to reconcile the expressions attributed to some of the Judges in *Williamson v. Goldie* (g), with this construction of the statute. That case was not brought to this House, and Lord *Jeffrey* thinks that, from the circumstances of that case, it is not necessarily a decision adverse to this construction. Be that as it may, it cannot, in this House, operate against our adopting a construction of the statute which appears to be the correct one, and which is necessary for the due operation of its several provisions. The particular road, or part of a road, being assigned to a committee of trustees, they are to appoint the officer for such road or part of a road ; they are to take security and to audit his accounts ; and they, to whom this security is given, are, by their clerk so appointed by them, to enforce against the surety the payment of the balance found due from the treasurer appointed by them, upon the examination and audit of his accounts.

If this be the right construction of the statute, the pursuer's title to sue is established without the necessity of considering the other ground upon which it appears to have been principally supported by the Judges of the Inner House. I certainly feel relieved by not being under the necessity of expressing any conclusive opinion upon that subject ; a question purely of practice, which has been thought free from difficulty in the Court below, and as to which, from

(g) 10 Shaw, D. & B. 413.

that cause probably, we are without any reasons given for the opinion expressed by the Judges. Upon a question of practice, the rule of the *Scotch* Courts, constituting as it does the law of *Scotland*, must prevail, and upon such a subject your Lordships would be most unwilling to disturb a deliberate judgment of the Court of Session. If any case should come before this House, calling for a decision upon that point, your Lordships will be anxious to be informed more fully as to the practice of the Courts of *Scotland* upon the subject, and as to the reasons upon which any decision upon it may be founded. No such practice exists in this country ; and if by the law of *Scotland* a party having himself a right to sue can, by such directions as were given in this case, enable another to maintain a suit in his own name, it will be necessary to consider many consequences which may flow from such a rule. In that case the usual provision in Acts of Parliament, that companies or other bodies may sue by their officer, will be unnecessary in *Scotland* ; and if the power exists only to enable a company to authorise a person to maintain a suit, and does not render the company liable to be sued in the name of the same person, it would appear that consequences may follow which are not consistent with obvious principles of justice. Here I must be understood as speaking of transactions which do not amount to assignments of the subject-matter of the suit, but which leave the property in such subject-matter, and therefore the fruits of the suit, in the party giving the authority to sue. These and many other considerations will, no doubt, receive all due examination by the Court of Session, in any case in which a similar question may be raised. I shall only further observe that the 109th section (1 & 2 W. 4, c. 43) does not

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aid the proposition contended for; because, if that section enables any person authorised by the trustees to sue for the penalties, that authority is conferred by the statute; whereas the argument in this case assumes a right of delegating the power to sue independently of any statutable provision.

As to the objection that *Creighton* was not named in the conclusion to the summons, I cannot but express my satisfaction that the learned Judges of the Court of Session have not found anything in the practice of that Court to compel them to give effect to such an objection. The summons does not in its conclusions name *Creighton*, but it states previously that *Rankin*, the principal, and *Creighton* and the other defenders as cautioners, had been applied to for payment, and had refused, unless compelled; and then, omitting the name of *Creighton*, but stating the name of the principal and of the other defenders, concludes that the said principal and cautioners aforesaid might be decreed to pay, &c. To this summons *Patrick Creighton* appeared and put in defences, but did not raise this objection. After his death, his representative, the present Appellant, sisted himself as a defender in this process in his place, but did not raise this objection, and the suit proceeding against him without this objection being made in the sheriff's court, a decree for payment was pronounced against him. It would have been much to be regretted, if, under such circumstances, the whole proceedings could have been set aside by the mere omission of the name of *Creighton* in the conclusion of the summons. In the case of *Capel v. Buller* (*h*), Sir *John Leach*, V. C., refused to permit a party who had appeared at the hearing, and consented to be bound by the decree, afterwards to

(*h*) 2 Sim. & Stu. 462.

object that he had never been served with process, or appeared to the suit.

The case then remains to be considered upon its merits. The Appellant is sued as the representative of *Patrick Creighton*, who became bound to the committee of trustees of the *Lochlibo* road as surety for *Robert Rankin*, junior, treasurer of that road, that he would faithfully execute his office, and from time to time, and as often as required, account for and make payment to the road trustees of his intromissions with the funds of the road, and of all monies that should be paid to him as such treasurer. It was also provided by the bond, that all monies to be received by the treasurer should be lodged in the bank in his name, and that he should at no time keep in his hands more than 20*l.* to answer contingencies. The conduct of the trustees, the parties assured, is made the ground on which the non-liability of the surety is rested: and as a most learned Judge, Lord *Jeffrey*, has expressed an opinion, although accompanied with much doubt, that the cautioners had thereby been discharged; and as it is of much importance that the rule of law in *Scotland* upon this subject should not remain in doubt; I think it right to go into some consideration of it, although the four Judges of the Second Division agreed in opinion that the surety was not discharged; in which opinion I entirely concur.

The ground upon which Lord *Jeffrey* thought that the cautioners were discharged was, that the trustees had neglected at the annual audits to require payment of part of the balance then in the treasurer's hands, and to direct the application of such part of the balance, being of opinion that there was no impropriety in there being in his hands part of such balances to meet

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the current expenses; and therefore he thought that the cautioners might, upon that ground, be relieved notwithstanding the decision of this House in the case of *Mactaggart v. Watson* (i). In that case the defence of the cautioner was that the commissioners had neglected the duty prescribed by statute, in not calling the trustee to account from 1826 to 1829, and upon that ground the Court of Session thought the cautioner relieved; but when the case came to this House, the noble and learned lord (Lord Brougham) who advised the House, observed truly, "That very dangerous doctrines on suretyship obligations appear to be suggested in some of the cases in *Scotland* (j):" the interlocutors appealed from were reversed, and the surety was declared to be liable. That case is of the highest importance, as it removes the authority of some early cases in *Scotland*, which are not consistent with it, and makes the rule applicable to such cases the same in *Scotland* as in *England*. Indeed it has not been contended at the bar that the rule in the two countries is different. Upon the rule in *England* there is no doubt. It is familiar to every lawyer, and I am glad to be able to expound it in the terms in which a Judge of the highest authority has laid it down, and which I think entirely correct. Lord Eldon says, in the case of *Samuell v. Howarth* (k), "The rule is this,—that if a creditor, without the consent of a surety, gives time to the principal debtor, by so doing he discharges the surety; that is, if time is given by virtue of positive contract between the creditor and the principal;—not where the creditor is merely inactive. And, in the case put, the surety is held to be discharged, for this reason, because the creditor by so giving time to the principal, has put it

(i) *Ante*, Vol. III. p. 525. (j) *Id.* 540. (k) 3 Meriv. 278.

out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not ; and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract." In *Eyre v. Everett* (1), a delay of five years, during which the obligee had not sued the principal, was urged as an exoneration of the surety, but the same learned Judge held the surety liable ; and this rule of law is so well understood in this country, and so well explained by Lord *Eldon*, that it is not necessary to enter into an investigation of any other cases on the subject.

What, then, are the facts of the present case with reference to this rule ?—The accounts were regularly examined and audited, and it may be assumed that it was the duty of the trustees not to leave more money in the hands of the treasurer than might be necessary for the current expenses of the road, and that, in fact, more was left in his hands than was necessary for that purpose ; but there is no evidence of any alteration in the terms of the contract to which the surety was a party ; nothing that could have precluded the trustees from requiring payment of the balance found due. There was, therefore, nothing more than an omission to require payment ; and although this might be a neglect of the duty imposed upon the trustees by the Act, it does not for that reason operate more strongly in favour of the surety, than a similar neglect of the course of proceeding which the surety might, from the usual course of business, or the routine of trade, or the nature of the transaction, have been led to expect would take place. Such neglect can only be urged in his favour as placing him in a different situation, and exposing him to greater risk,

(1) 2 Russ. 381.

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than he had intended ; and this effect is produced by every omission in keeping the principal punctual to his payments ; but such omission cannot be pleaded as an exoneration of the surety.

It was truly said that the trustees had improperly sanctioned the treasurer's applying the balances in his hands for the *Lochlibo* road, to defray the expenses of the *Monkredding* road ; and this I think appears to be the case ; for I cannot think that the *Monkredding* road can be considered as included in this bond ; but that does not appear to me to be material, as the facts arise in this case. If, indeed, the attempt had been to make the surety repay balances from the *Lochlibo* trust, which the treasurer had, with the consent of the trustees, applied in repaying to himself balances due to him upon the *Monkredding* road, a question would arise whether such application of the *Lochlibo* trust balances was not equivalent to payment to the trustees, for the purpose of relieving the sureties from a claim for so much of the balances as were so applied ; but no such case arises. The Appellant, in his revised case, states the annual balances of the *Lochlibo* trust in the treasurer's hands, and brings out 367*l.* 6*s.* 8*d.* as the ultimate balance on the 4th of *June* 1833 ; and he also shows the effect of including the *Monkredding* account, which does not materially affect the balance, as indeed it could not, the balance due to the treasurer on the *Monkredding* road in *June* 1833 being only 10*l.* 15*s.* 2½*d.* ; and the Appellant's minute, given in pursuant to the interlocutor of the 18th of *January* 1838, shows that he has not, in the sum which he has been decreed to pay on account of the *Lochlibo* trust, been prejudiced by the manner in which that account has been blended with the account of the *Monkredding* road. It would, indeed, from that

minute, appear that a small part of the sum the surety has been decreed to pay, consists of a balance due from the treasurer in respect of *Monkredding* road to 26th of *May* 1833; but in the former part of his case, he states 10*l.* 15*s.* 5½*d.* to have been due to the treasurer on that account on the 4th *June* 1833. I have not been able to reconcile these two statements; but the difference, if any, must be very small, and no case is made for the Appellant upon any such error in the accounts.

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I am, on the whole, perfectly satisfied that the interlocutors appealed from are correct; I shall, therefore, move your Lordships that they be affirmed, with costs; for although the Lord Ordinary threw out an opinion upon the merits of the case, he came to no judgment, but made *avizandum* to the Second Division, and the judgment of the Inner House was unanimous.

In the other appeal, with respect to the *Irvine* trust, the circumstances do not appear materially to differ from those of the present case; I therefore move your Lordships that the interlocutors complained of in that appeal also be affirmed, with costs.

Interlocutors in both appeals affirmed with costs.

JOHN COPLAND - - - - - Appellant.

MARGARET TOULMIN and Others - - Respondents.

R. and *A. T.* having carried on the business of navy-agents as partners in equal shares, and *R.* having retired, leaving the partnership accounts unsettled, with large balances due to the firm from its customers, *A. T.* took *C.* into partnership, the customers' accounts were transferred to the new partnership books, and the business was carried on as before, until *A. T.*'s death, without any agreement in writing, or settlement of accounts between

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May 1. 11.
25. 28. 31.
June 1.
1840 :
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Partnership,
Shares in.
Accounts,
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these partners, or other evidence to show their shares in the concern. On a bill being filed by *A. T.*'s representatives against *C.* for an account, he stated that the agreement was "that if *A. T.* would bring into the partnership 40,000 *l.* of good debts due from the customers to the former partnership, his share in the concern should be two-thirds and *C.*'s one-third, otherwise they should have equal shares;" and that, in consequence of *A. T.*'s not bringing in the 40,000 *l.* of good debts, the agreement was varied accordingly. There were entries in the accounts debiting the partners equally with the prices of wines purchased, and with losses on transactions in the public funds; and one witness said that *C.* directed him in *A. T.*'s presence to make up the general partnership accounts in equal shares.

HELD, that as it was established by a judgment in a former appeal, that the 40,000 *l.* of good debts were brought into the new partnership according to the agreement, the event in which it was to be altered never occurred; and as the accounts were uniform and contained no evidence of an alteration, the partnership was continued in the proportion of two-thirds to *A. T.* and one-third to *C.* (*Infra*, pp. 370. 373.)

HELD, also, that in taking the accounts between *C.* and *A. T.*, and between them and the former firm, the monies paid in by the customers of both firms without specific appropriation or contract, were to be applied first in discharge of their debts to the former firm, according to the rule in *Clayton's* case, although *A. T.*, in an affidavit made by him in a suit between himself and *R.*'s representatives, swore that it was agreed between him and *C.* that the advances to be made by them to the creditors should be first repaid out of their payments, and the surplus only in liquidation of their debts to the former firm. (*Infra*, pp. 375, 376.)

Evidence is not to be received of admissions or declarations made by parties, and not put in issue by the pleadings. (373. 375.)

It requires a very strong case to induce the Lords to reverse a decree, nine years after its date, especially if that decree established no fact, adjudicated no right, but merely directed proper inquiries to obtain information for the Court, and the objects of it were exhausted, the Appellant himself having joined in the inquiries and failed. (*Infra*, p. 369.)

It is irregular, by an exception to a report, to raise a proposition foreign to the subject-matter of the report. (*Infra*, p. 377.)

THE order of this House, on the appeal between the present Respondents and the Appellant, in 1834, (reported *ante*, Vol. II. p. 681), reversing an order of the Court of Exchequer, which disallowed an exception to the Master's separate report, and remitting the cause, with instructions to allow the exception, was

made an order of that Court; and in pursuance thereof, it was referred back to the Master to review his said report. The Master accordingly made another separate report on the 2d of *July* 1835, and thereby certified that he found that *Abraham Toulmin* did bring into the partnership of *Toulmin & Copland* 40,000*l.* of good debts, which were owing to the former partnership of *Richard* and *Abraham Toulmin*, according to the true intent and meaning of the agreement mentioned in the decree made in the cause in 1828. And he further certified, “that he found, by the evidence laid before him, that the agreement was varied and altered after the commencement of the partnership between *A. Toulmin* and the Appellant, and that it was agreed between them that they should carry on and be interested in the partnership in equal shares, and should receive and pay the profits and loss in equal moieties.”

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To this report the Respondents took two exceptions; insisting by the first, that instead of the above finding, the Master ought to have found that the said agreement was not afterwards varied or altered; and by the second, that the Master had not stated under what circumstances and in what respects the agreement was varied and altered.

Those exceptions were argued before Lord *Abinger*, C. B., who, by an order made on the 27th of *February* 1836, allowed them, and directed the Master to review and vary his report (*a*).

The Master accordingly, by his report, dated the

(*a*) The following are extracts from the short-hand writer's notes of his Lordship's observations during the argument:—"I do not see how to get over this part of the argument. The House of Lords has established and decided, that the 40,000*l.* were brought in, in pursuance of the contract; and the only question is, whether,

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30th of *November* 1838, certified, that in obedience to the last-mentioned order he reviewed his said

independent of that circumstance (the reason that Mr. *Copland*, in his affidavit, gave for the new agreement, having failed) any new agreement did take place. Chief Baron *Alexander*, when he made the decree in 1828, had before him the whole of the evidence to sustain any inference of a new agreement that the Master had; the object of his reference to the Master afterwards was to give the advantage to Mr. *Copland* of adding more evidence before the Master than had appeared before the Court, to induce the Chief Baron to make a decision that there was a new agreement; because, if the evidence before the Chief Baron was sufficient to warrant the opinion that there was such a new agreement, it was the duty of the Chief Baron so to decide, and not to make this reference to the Master. He must have been of opinion that the evidence, as it then stood, was too doubtful for him to come to a decision that *Copland* and *Toulmin* had made a new agreement. The reference was made to give *Copland* an opportunity of producing new evidence before the Master. I don't know that any new evidence was produced: the *onus probandi* was thrown upon *Copland*. That appears to be the short view of the case."

His Lordship afterwards, in giving his judgment, observed: "I not only think that it was too doubtful to have come to the conclusion that a new agreement was made, assuming always, as the House of Lords declared, that *Toulmin* complied with his engagement according to the spirit of it, in the bringing in the 40,000*l.* good debts; but I do not think the evidence referred to by *Harrison*, on the books, which is the only evidence besides that of *Edmunds*, at all justifies the inference*. That evidence, I must conclude, did not satisfy Chief Baron *Alexander*—did not justify him in drawing such an inference; nor would it satisfy me.

"Supposing the fact to have been, which now I assume, that the original agreement was a partnership for two-thirds for *Toulmin* and one-third for *Copland*; if any variation took place, it became important for *Copland* then to have that variation established by entries in the books, and by making up the partnership accounts. Now, *Edmunds* swears to a conversation that took place 14 years before he gave his evidence. It is a long time to recollect a conversation of a precise character. He supposes, and I have no doubt believes, that he had that direction from *Copland*; and he also believes that *Toulmin* heard him: that depends on the recollection of 14 years. How very few men there are who could undertake, if they were cross-examined in a Court of Justice, *vivâ voce*, to swear positively to such a recollection? I should doubt very much, assuming the fact that an agreement had been made for a partnership, and that the interest was divisible into thirds, two-thirds to one man,

* See the evidence, 2 Clark & F. 693, *et seq.*

report, and found that the agreement was not varied, and that the partnership between *A. Toulmin* and the

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and one-third to another, and no evidence whatever of any new agreement,—whether a jury would ever draw a conclusion, upon the memory of a witness of a conversation 14 years back that he had received a direction so to make up the books, that that was evidence of the agreement. Where is the consideration for the alleged new agreement? What change of circumstances had taken place to give rise to it? It is argued very ingeniously by Mr. *Copland's* counsel, that although the House of Lords has put a proper interpretation on this agreement, and that by the facts in evidence the agreement has been complied with, in their sense of it; yet it was competent for *Toulmin* and *Copland* to put a different sense on it, and then to have come to the new agreement, on the supposition that the first was not performed in their sense of it.—Could their sense of it be different from the expression in *Copland's* own affidavit †, that *Toulmin* was to bring in 40,000*l.* of good debts to meet claims? It is quite plain he has done that effectually; and how can I assume, for the purpose of raising a conjecture, founded on imagination and inference, that they misunderstood the agreement in the real sense of it, which was very plain from the words of it, and that it meant something else, and therefore they made some new agreement, which is not proved, except by *Copland's* own suggestion, in order to vary the original contract? It is true *Copland's* affidavit goes to that effect; but although I do not mean to question his veracity, one cannot take the affidavit of a defendant in his own favour, as evidence on a fact that is controverted. It is receivable evidence, but it is not evidence that a Court is warranted to pronounce a judicial decision upon, unless it be admitted, or confirmed by other facts in the cause.

“ Assuming, therefore, that the original contract was for a partnership in three parts, one of which only was to be *Copland's*, without any sort of evidence of any new agreement to change it, or any proof of a consideration to justify a new agreement to change it; could any jury in the world be advised by any Judge to give credit to the mere evidence of a witness of a conversation 14 years before, that he had heard *Copland*, in *Toulmin's* presence, direct him to make up the books on the footing of an equal partnership, and that *Toulmin* had made no objection to it? Is that sufficient evidence to prove such an agreement? Chief Baron *Alexander* did not think that that evidence, accompanied with the evidence of *Copland's* affidavit, was sufficient; nor did he think that the evidence of the books was sufficiently conclusive to induce him to form that judgment.

“ I cannot conceive but that the transaction respecting the stocks, which is the foundation, or one of the foundations at least, of the inference that is drawn of an equal concern, is a mistaken one.

† See the affidavit, 2 Clark & F. 684.

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Appellant was to be considered as in thirds; and he directed the accounts to be taken on that principle.

I have no doubt that *Harrison* is a good accountant; but I have had experience of many accountants in Courts of Justice; they sometimes make mistakes like other men; their conclusions are not absolutely inevitable; and as *Harrison* has given us the foundation of his judgment, we can look at it, for it is quite clear, on his statement, that he refers for the judgment he draws that these books furnish evidence of equality of interest, to those particular items only which have been the subject of discussion before me yesterday;—the stock transactions. We find instances of stock speculations, which are gambling transactions, in which the losses are paid by the partnership drafts; but immediately, and upon some direction by *Toulmin* himself, they are charged in equal portions to the two partners. Now that this was not a partnership transaction, is perfectly clear. If the parties had made together an expedition to *Newmarket*, and had there betted on some race, and had put their accounts into hotch-potch, and paid them by a draft of the copartnership funds, they would have just done the same thing—they would have directed the clerk to charge each man's separate account with an equal portion, but that would not be a partnership transaction. The very circumstance of its being so charged, and charged at the very moment, shows that the transaction is completed at once, and that it is not entered in the partnership books in any other way than merely as a payment made to each individual partner. It is exactly the same as if each individual partner had drawn a draft on the partnership concern, payable to himself; he does what he likes with that draft, the clerk charges him in his private account with it. Navy agents, I presume, do not enter into transactions of gambling as matters of partnership; if they make joint transactions in gambling, on each occasion they will do it by a specific contract with the other, as one partner could not bind another in such a transaction. Suppose there had been three partners in this concern, and all habitually paying their private accounts by draft on the partnership, in which case the separate account of each person would be debited with that draft: suppose two had agreed to have a transaction in the funds to make a speculation of this nature, without consulting the other; or the other, a prudent man, would not be concerned in it at all; the same thing would have happened; they would have paid the money for the loss by a cheque on the bankers of the partnership; and the clerk would have debited, in equal moieties, the two partners who made the transaction, to the amount of the loss. I do not think, therefore, any of those transactions furnish any evidence whatever of a partnership in equal moieties; nor that those were partnership transactions, because if they were, there would be no occasion to carry them immediately to the debit of each party.

“Well, then, next come the household expenses. If the charge had been for wine purchased by the house, and that wine had been sent to each party, and each party debited with the wine so sent, what would the inference have been? Why, that each partner dealt

By another separate report, bearing date the 15th of *February* 1836, the Master, after certifying that states of facts had been laid before him on behalf of the Appellant and Respondents, supported respectively by the evidence mentioned in that report, found, amongst other things, that, in taking the accounts

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with the house, as they would with any other wine-merchant, and was charged in the account with what he had: that is the case as to some of the entries, but not of the entries where the charge is to household expenses. The very circumstance of its finding no further place in the accounts, but terminating in household expenses, shows it was bought for some purpose connected with the household expenses, as against both these partners: that it is inevitable, and it comes under all those charges which are charges of household expenses, payment of house rent, payment of land tax, of assessed taxes, and of every other charge that belongs to the common house. I do not find from the evidence, that they dispensed this wine in their common house, that is, the house belonging to both, but yet it is household expenses. It appears to me to be a just and legitimate inference, that it was a contract between them, that the wine which they purchased for the household expenses should be equally divided between them; because the household expenses could not fairly be charged, unless it was for the entertainment of customers.

“What inference is to be drawn from the account not being balanced, or settled at all? It is argued that it was so much the interest of *Toulmin*, if he had the larger share, to have the accounts settled, that therefore the argument is strongly against him that they were not balanced and settled. I do not feel that: on the other hand it may be said, as soon as the agreement was changed, if it was changed, it was so much the interest of *Copland* to have some evidence of it, as he had none but the honour of his partner and his memory, that he ought to have it immediately evidenced by some settlement of the books. One of the clerks who had been with them all the time, and who is with *Copland* now, swears he could not make out by the books to what degree they were interested respectively. That argument, therefore, stands equal; it appears to me to make nothing in either scale.

“Considering that the House of Lords have established one part of this case in a way in which I am not at liberty to shake it by any issue on the subject; considering, that on the remaining part, the evidence did not, in the opinion of the Chief Baron, justify him in coming to the conclusion that there was any variation of the agreement; and considering that the Master has had no new evidence to lead to that conclusion, and being myself very strongly of opinion, that on the evidence, as it stood, the Master ought not to have come to that conclusion any more than the Chief Baron did,—my disposition is to allow these exceptions.”

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between *A. Toulmin* and the Appellant, as directed by the decree of *June 1828 (b)*, all sums received by the firm of *Toulmin & Copland* from their customers and clients, who had been debtors to the former firm of *Richard & Abraham Toulmin*, and to whom advances had been made by the firm of *Toulmin & Copland*, in the ordinary and necessary course of the business and practice of navy agents, should, in the first place, be applied towards the discharge of such advances and interest respectively, and that the surplus only should be applied towards the discharge of debts due from such customers and clients respectively to the firm of *Richard & Abraham Toulmin*.

The Respondents took four exceptions to that report, of which it is only necessary to state the second, viz. "that the Master, regard being had to the evidence laid before him, instead of his said finding, ought to have found, that in taking the accounts between *A. Toulmin* and the Appellant, as directed by the said decree, all sums received by the firm of *Toulmin & Copland* from their customers and clients who had been debtors to the firm of *Richard & Abraham Toulmin*, and whose debts had been transferred to their respective accounts in the books of *Toulmin & Copland*, should in the first place be applied towards the discharge of the debts owing to *Richard & Abraham Toulmin*, and of the interest thereon, and that the surplus only (if any) should be applied towards the discharge of the advances and interest in the said report mentioned; and that the firm of *Toulmin & Copland*, as between them and *Abraham Toulmin*, should be charged with the sums so firstly applied, and with interest thereon from the times when the same were

(b) See the decree, *ante*, Vol. II. p. 685.

respectively received to the 4th of *January* 1819, at the rate of 5*l. per cent. per annum*, with annual rests.”

The four exceptions came on to be heard before Lord *Abinger*, C. B., who, by an order bearing date the 17th of *December* 1836, was pleased to allow the said second exception (c), except where it appears on the face of the accounts in the books of the firm of *Toulmin & Copland*, in the Master’s said report mentioned and referred to, that deductions had been made from particular receipts, and the balances only carried to the credit of the account: and it was thereby referred back to the Master to review his said report, and vary and amend the same accordingly.

In *February* 1837, the Appellant presented his appeal to this House from the said orders, dated respectively the 27th of *February* and the 17th of *December* 1836.

While that appeal was pending, various proceedings were taken in the Court of Exchequer in prosecution of the original decree pronounced in *June* 1828 (d). In *November* 1837 the Appellant enrolled that decree and presented an appeal against it. That appeal was objected to by the Respondents, as being against the standing orders of the House, but the Appeal Committee sustained it on the authority of the case of *Brooke v. Champernowne* (e). Both appeals came to be heard together in *May* 1838.

Mr. *Knight Bruce* and Mr. *Wakefield*, for the Appellant:—The protracted litigation between those parties was caused by the want of any written agreement of the terms of the partnership between the Appellant and *Abraham Toulmin*. From the com-

(c) See 3 Y. & C. 625.

(e) *Ante*, Vol. IV. p. 247.

(d) *Id.* 382, 643, and 633.

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mencement of that partnership in 1806, until the death of Mr. *Toulmin* in 1819, their business was carried on by them without coming to any settlement of accounts. When the Respondents, as the representatives of *A. Toulmin*, filed their bill for an account against the Respondent, they had not a particle of evidence to show the proportions of interest which each of the partners had in the concern. The only evidence on which their claim to two-thirds has been founded, was furnished by the Respondent, in an affidavit which he made in support of a motion in an early stage of the cause. In that affidavit he says, "It was on the formation of such co-partnership, in the first instance, agreed between this deponent and the said *A. Toulmin*, that upon the said *A. Toulmin*'s bringing into the said partnership between him and this deponent 40,000*l.* of good debts which were owing to the late concern, which was carried on in partnership between the said *A. Toulmin* and *Richard Toulmin*, then a lunatic, and which was for the purpose of meeting the claims by debts transferred from the said firm, and upon this deponent's bringing 4,000*l.* into the said partnership concern between him and the said *A. Toulmin*, the said *A. Toulmin* should be entitled to two-thirds of that concern, and this deponent to the other third; but the said *A. Toulmin* not being able to bring 40,000*l.* of good debts into the said partnership concern, it was afterwards agreed between this deponent and the said *A. Toulmin*, that they should carry on their said co-partnership trade or business of navy agents upon equal terms as to profit and loss, and they did accordingly so carry on such trade or business."

This House has decided in the former appeal that *A. Toulmin* brought in the 40,000*l.* of good debts, in the true sense and meaning of the agreement. To

that decision the Respondent is bound to submit, however aggrieved he may be by the result. But although the state of facts presented to the House justified the conclusion to which the House came, there is no inconsistency in supposing that the partners themselves did not consider the terms of the agreement to have been complied with in their sense of its meaning, and that therefore they came to a new agreement to carry on the business in equal shares of profits and loss. That supposition is consistent with the decision of the House, with the state of the accounts, with the affidavit and answer of the Appellant, and also with an affidavit made by *A. Toulmin* in the matter of his brother's lunacy. The latter part of the Appellant's affidavit stating the alteration of the agreement, is as much entitled to credit as the former part, which states that by the original agreement Mr. *Toulmin* was to be interested in two-thirds of the business. This affidavit was made evidence in the cause by the Respondents, and if admissible at all, it should be taken altogether, and that part which was for the benefit of the Appellant should be read for him, as the other part was read against him ; *Boardman v. Jackson* (d).

There were depositions of a witness named *Reynolds*, read *de bene esse* at the hearing. They set forth a conversation which that witness said he had with the Appellant, after the suit had commenced, to the effect that the Appellant admitted that he was only entitled to one-third share, but that the Respondents had offered him four-ninths, which he would accept. These depositions were properly objected to as inadmissible by the rules of pleading and evidence, as, the alleged conversation not being put in issue by the pleadings, the Appellant had no opportunity of contradicting

(d) 2 Ball & B. 382.

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or explaining it; *Hall v. Maltby* (e); *Fitzgerald v. O'Flaherty* (f).

The Master, upon the whole of the evidence laid before him, certified by his report of the 2d of *July* 1835, that the original agreement was afterwards varied, as stated in the Appellant's affidavit, so that the partners were interested in moieties of the concern. Some entries in the partnership books showed that the prices of wines purchased, and losses on certain stock transactions, were paid out of the partnership funds, and debited to the partners in equal shares; there was no entry showing an inequality of shares: all the accounts and all the transactions deposed to by the witnesses were consistent with a partnership in equal shares, which is also the presumption of law in the absence of any evidence to the contrary; *Peacock v. Peacock* (g). The Lord Chief Baron, in his judgment in *February* 1836 (h), allowing the exceptions taken to the Master's report, admitted that it was not inconsistent with the decision of this House on the former appeal; but his Lordship was of opinion that the balance of evidence was against the equality of partnership. That, it is submitted, is an erroneous opinion, and the order ought to be reversed.

The second order complained of in the first appeal allowed exceptions to the Master's report as to the principle on which he directed the partnership accounts to be taken. After the declaration by this House that the 40,000*l.* of good debts had been brought into the concern by *A. Toulmin*,—without, however, stating when or how,—was made an order

(e) 6 Price, 240. (f) 2 Molloy, 326; see also the late cases of *Austin v. Chambers*, and *Attwood v. Small*, ante, Vol. VI. pp. 38, 350, 488 & 516.

(g) 16 Ves. 49.

(h) *Supra*, p. 351.

of the Court of Exchequer, the Master next reported that though he found the 40,000*l.* had been brought in, the agreement had been varied, and the partners became equally interested. The Lord Chief Baron dissenting from that conclusion directed the Master to review and vary that report, and the Master accordingly by his next report certified that the agreement had not been varied. By a subsequent report, the Master, considering the partnership to be two-thirds to *A. Toulmin*, and one-third to the Appellant, as was declared by the last order of the Court, stated that the principle on which he proceeded to take the accounts between them as directed by the decree of *June* 1828, was by applying all monies received by the new firm of *Toulmin & Copland* from the debtors to the former firm, to whom the new firm had made advances, in discharge of such advances first, and applying the surplus only in discharge of the debts due by them to the old firm. The Lord Chief Baron, in allowing exceptions to that report, disapproved of the principle on which the Master proposed to take the accounts, and declared that the converse of that principle, independent of the rule in *Clayton's* case (*i*), was the proper mode of taking the accounts (*k*). But his Lordship's arguments in support of the order then made,—which is the second complained of in the first appeal,—powerful as they unquestionably are, cannot stand against the evidence contained in Mr. *Toulmin's* own affidavit, made in the lunacy of *Richard Toulmin*, and declaring that, in forming the partnership with Mr. *Copland*, it was agreed between them that the advances to be made by them to the old customers should have

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(*i*) 1 Meriv. 572.

(*k*) 3 Y & C. 625.

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priority of payment over the debts due by the customers to the former firm. The proceedings in the matter of the lunacy did not affect Mr. *Copland*; as to him they were *res inter alios acta*; but *A. Toulmin* was bound by them. Notwithstanding his affidavit in that cause, and Mr. *Copland*'s concurrence in it, the Lord Chief Baron decided against the agreeing statements of those contending parties on the ground that as a matter was decided one way in *R. Toulmin*'s lunacy, another matter should be decided in the same way in *Toulmin v. Copland*.

The affidavit of Mr. *Toulmin* and the other evidence—including the partnership books—on which the Master grounded his report of *February* 1836, proved that the only correct mode of taking these accounts directed by the decree of 1828, was, as stated by the Master, that all sums received by the firm of *Toulmin & Copland* from customers and clients who had been debtors of the firm of *A. & R. Toulmin*, and to whom advances had been made by *Toulmin & Copland* in the ordinary and necessary course of their business, should in the first place be applied towards the discharge of such advances and interest; and that the surplus only should be applied towards the discharge of the debts due from such customers and clients to the firm of *A. & R. Toulmin*. It is alleged that those who represent the estate of *Richard Toulmin* object to that mode of taking the accounts, insisting that the first payments recovered from customers should be appropriated to the payment of the debts to the old firm. But no third party had a right to interfere and vary the agreement between *Toulmin* and *Copland*. The order is manifestly wrong so far as it allows the latter clause of the second exception, which insists that the firm of *Toulmin & Copland* should be charged

with interest at 5*l.* per cent. with annual rests, on the sums applied by them in discharge of their own advances.

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The second appeal complains of the decree of 1828, directing an inquiry to ascertain the terms of the partnership agreement, as there was nothing in the cause to found such an enquiry on. In the absence of evidence of contract, the law presumes that persons who enter into partnership together, are to be interested in equal shares, and the whole of the evidence as to the nature of the partnership agreement was contained in the Appellant's affidavit, of which the Court might judge without any reference. That affidavit having been read in the cause by the Respondents, was to be taken against them as conclusive of the terms of the partnership. The Appellant did not appeal against the decree when it was pronounced, because he believed he should be able to satisfy the Master that the partnership was in equal shares; and so the Master found, and Chief Baron *Alexander* was of that opinion. If this House should entertain any doubt of the terms of the partnership, it may yet direct an issue to a jury, and order Mr. *Copland* to be examined as a witness. That course was taken in *De Tastet v. Bordenave* (1), *Roe v. Gudgeon*, and *Peacock v. Peacock*. These two cases are not reported on this point.

Mr. *Simpkinson* and Mr. *Jacob*, for the Respondents:—By the decree of 1828, Chief Baron *Alexander* directed inquiries on three heads: 1st. whether the 40,000*l.* of good debts were brought from the old to the new firm, according to the partnership agreement. This House held in the former appeal (m) that the 40,000*l.* were so brought in, and reversed the Chief

(1) Jac. 516.

(m) 2 Clark & F. 681.

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Baron's order, which overruled exceptions to the Master's report, finding that the 40,000 *l.* were not brought in. The Master then proceeded on the second head of inquiry; whether the partnership agreement was at any time varied, and he reported that it was. Exceptions taken to that report were allowed by the present Lord Chief Baron's order, which is the first order complained of in the first appeal. The Master next proceeded to the third head of inquiry directed by the decree, namely, as to the mode of taking the partnership accounts, taking the shares of the partnership to be two-thirds to *A. Toulmin* and one-third to *Copland*. To the Master's report on that point also exceptions were taken, and allowed by the Lord Chief Baron's order of *December* 1836, which is the second order comprised in the first appeal. After that appeal was set down for hearing, the Appellant presented an appeal against the decree of 1828, without taking any notice of the pending appeal, or of the order of the House on the first appeal, declaring that the 40,000 *l.* of good debts had been brought in by *M. A. Toulmin*, in the true meaning of the partnership agreement; and without stating the several orders and proceedings which have taken place under the decree and from which the Appellant has not appealed. This last appeal is open to many objections, but the Appellate Committee allowed it to be brought to a hearing. This House forbids the practice of splitting appeals. *Norbury v. Meade* (*n*). There an appeal was brought against part of a decree, and the Appellant, having succeeded, then appealed against the other part.—[The Lord Chancellor: There the two appeals were against the same order; here they are against different orders as in *Champernowne v. Brooke* (*o*). The competency of

(*n*) 3 Bligh, 212. 261.

(*o*) *Ante*, Vol. III. p. 4, and Vol. IV. p. 589.

this appeal was discussed before the Appeal Committee, and allowed.]—The objections to it on the merits remain yet to be disposed of. The real object of this appeal is to get rid of the order of the House in the former appeal, and to send for inquiry before a jury the very question which this House has already decided. After that decision, that the 40,000*l.* of good debts were brought in by *A. Toulmin* in the true sense of the partnership agreement, there was no longer any question to be made that the partnership was in thirds. If the Appellant had been dissatisfied with the inquiries directed by the decree, he ought, before the inquiries were completed, to have asked the issue which he now claims. In that case the Court might have followed the course pointed out in *De Tastet v. Bordenave* and the other cases that were referred to. But if appeals of this kind were encouraged, orders of very ancient date, which might appear defective, erroneous, or imperfectly expressed, would be brought under review, although all the subsequent proceedings in the causes in which such orders were pronounced might be perfectly right. An instance has recently occurred in the case of *The Earl of Kingston v. Viscount Lorton* (*p*).

The inquiries directed by the decree were necessary in consequence of the ambiguous and contradictory statements made by *Copland* of the terms of the partnership, in his affidavit and in his answer, agreeing only in this, that the partnership was to be in two-thirds and one-third, if *Toulmin* brought in the 40,000*l.* This House has acted on the decree, and decided that *Toulmin* did bring in that amount of good debts according to the true intent and meaning

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of the partnership agreement. Any variation that the House might now make in the decree would be inconsistent with its former order, and the parties could not now be placed in the situation they would have been in if that order had not been made. Besides, the decree was warranted by the evidence adduced at the original hearing. Although the depositions of *Reynolds* of the conversation with the Appellant were not strictly admissible in evidence, as not being put in issue by the bill, they showed that *Copland's* answer to the bill was not to be trusted, and that inquiry was necessary.

The law does not always presume, in the absence of agreements, that partnerships are on equal shares: the rule depends on circumstances. In *Peacock v. Peacock* (q), the jury inferred from the circumstances that the partnership was in quarter shares, three to the father and one to the son. The circumstances of the present case were these: *A. Toulmin* was the remaining partner of an old-established firm, having upwards of 1,000 accounts with naval men; *Copland*, a purser in the navy, without any connexion, brings only 4,000*l.* into the concern: it is reasonable that a partnership under such circumstances would be in the proportion of two shares to one. An instance of it occurred in the case of *Robley v. Brooke* (r).

As to the other appeal from the orders of the 27th *February* and 17th *December* 1836, there was no case made by the Appellant to justify the House in dissenting from these orders. It has been before decided that the terms of the original agreement, stated by the Appellant himself to have been in thirds, were strictly complied with, and there was no evidence that the agree-

(q) 16 Ves. 49.

(r) Bligh, 20.

ment was ever varied after the commencement of the partnership.

From the mode of keeping the accounts with the customers of the firm of *Richard & Abraham Toulmin*, adopted by the firm of *Toulmin & Copland*, and continued down to the death of *A. Toulmin*, the first receipts from such customers were applicable to the payment of the balances owing to the firm of *R. & A. Toulmin*. The advances made to such customers were in fact (except to the extent of so much, if any, of the 4,000*l.* capital brought in by the Appellant, as might be applied to that purpose), made by the firm of *Toulmin & Copland*, out of the assets of the firm of *R. & A. Toulmin*. And the balances, owing to the firm of *R. & A. Toulmin*, and adopted by the firm of *Toulmin & Copland*, cannot be recovered by the representatives of *R. & A. Toulmin*, in consequence of the mode of dealing with them by the firm of *Toulmin & Copland*; and all remedies to recover them are barred by lapse of time. The decision in the lunacy on the question was, in fact, a decision as binding upon the Appellant as upon *Abraham Toulmin*.

The *Lord Chancellor*:—The questions raised in these appeals depend on circumstances so numerous and various, that it will be necessary to take time to consider them before we can give judgment.

The *Lord Chancellor*:—My Lords, this case came before your Lordships on two appeals; the first is from certain orders of the Court of Exchequer: after that appeal was presented, the second was brought, complaining of the original decree in the cause, pronounced so long ago as the 12th of *June 1828*.

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I propose to consider this second appeal first, as it relates to the earlier stage of the cause; and if your Lordships should be of opinion that the original decree was wrong, it necessarily follows that all the subsequent proceedings will fall with it. That decree merely contained a reference to the Master to inquire, first, whether one of the partners of the firm, *A. Toulmin*, brought into the partnership of *Toulmin & Copland* 40,000*l.* good debts due to the former partnership, according to the true intent and meaning of the agreement, stated in a certain affidavit of the Appellant; and, secondly, whether such agreement was at any time varied. Under that reference the Master made a report on the 26th of *May* 1830, in which he negatived the fact first inquired into. The accuracy of that finding was questioned by exceptions taken, which were heard in *December* 1830, and were overruled. The result therefore of the decision of the Court of Exchequer upon that subject was to negative the proposition that 40,000*l.* good debts had been brought into the concern of *Toulmin & Copland*. That decision became the subject of appeal to this House, and by an order of this House, of *May* 1834, the decision was reversed, and the exceptions taken to the report were allowed (*s*). It therefore became established, by an authority which could no longer be questioned anywhere, that *A. Toulmin* had brought into the concern 40,000*l.* of good debts, and he had therefore to that extent performed the contract which he had entered into with his partner *Copland*.

The parties went on, and in *July* 1835, there was a report on the second part of the inquiry, by which the Master found the agreement had been varied.

(*s*) *Ante*, Vol. II. p. 681.

That finding also became matter of question before the Court of Exchequer on exceptions to that report ; and by an order made in the year 1836, the exceptions were allowed. The Court of Exchequer in that instance, therefore, established the fact that the original agreement had not been varied by any subsequent agreement between the parties.

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Various proceedings followed in the cause, until at last, in the year 1837, nine years and a half after the original decree had been made, the Appellant thought it expedient to appeal against that decree, to which appeal I am now confining my observations. That decree directed mere inquiry. It may be undoubtedly true that a decree ought not to contain a mere inquiry, and that there was either no ground for the inquiry, or that some other mode of inquiry ought to have been adopted ; but it will require a very strong case, where all the objects of the decree have been exhausted—where the decree adjudicates no right, establishes no fact, but is merely an act of the Court by which the Court desires that further information may be obtained—it will require a strong case to induce your Lordships to reverse a decree made merely for the purpose of ascertaining the fact in order to enable the Court with more certainty to adjudicate between the parties. Now it appears that the answer which the Appellant put in to the Respondent's bill stated the contract to have been, that if *A. Toulmin* brought in 40,000 *l.* of good debts, then the partnership between them should be in thirds ; *Toulmin* being in that case to have two-thirds, and *Copland* to have one-third. We have now the fact, by the judgment of this House, that those 40,000 *l.* were brought in, and that *Toulmin* therefore did perform his part of the contract. We have, therefore,

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according to the answer, a statement of the partnership terms; the answer denying the fact of the 40,000*l.* having been brought in, but that fact being established; the case stated by the answer is that in an event, now proved to have existed, the parties were to divide the profits in thirds. The present contest, on the part of Mr. *Copland*, is, that the ultimate agreement between the parties was, that the partnership profits were to be divided in moieties. The affidavit referred to in the decree is an affidavit in which it is stated that, upon failure of *A. Toulmin* to bring in 40,000*l.* a new agreement was made. It states the original agreement, namely, that the parties were to divide in thirds, if 40,000*l.* were brought in, the same as the answer; but the affidavit goes on to say, that *A. Toulmin* having failed in bringing in 40,000*l.*, 'the parties afterwards agreed to divide the profits in moieties. Now inasmuch as it has been established by the judgment of this House that the 40,000*l.* were brought in, according to the true intent and meaning of the contract, that event never occurred upon which, according to the affidavit, the parties entered into a new contract; the affidavit stating that it was on failure, that is, on an event which never took place, that the new contract was entered into between the parties.

My Lords, it was said that this affidavit must be taken altogether; that is to say, if it is used for the purpose of showing what the original contract was (namely, that there should be a division into thirds if the 40,000*l.* were brought in), it must be taken together, and therefore you are bound to take that part of the statement which states the new contract. It is quite certain that it must be taken together, but it does not follow because it must be taken together,

that every part of it is conclusive of the fact of which it is evidence, and the Court therefore required further information, and directed the Master to exhaust the first inquiry as to the payment in of the 40,000/., and then directed him to inquire whether there had been any subsequent contract entered into between the parties. That inquiry refers to the other appeal; I need not advert to it further than to state that the party now appealing having exhausted the subject matters of inquiry, and having in my opinion failed in both, he then complains of the Court having inquired into these facts at all.

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My Lords, I think that extreme case does not occur here, in which your Lordships would be disposed to disturb a decree merely directing inquiries, after the lapse of time which has taken place, and after the proceedings which the parties themselves have followed up in consequence of the inquiries directed by that decree; but if it were not for that time, and if your Lordships were called upon to exercise an opinion upon the original decree immediately after it was pronounced, I should say this is a case of all others in which it was the bounden duty of the Court further to inquire of the facts, because the answer sets up the defence. I know that the answer was not read, but the Court and both parties are entitled to look to the answer to see what is the nature of the defence set up. The defendant (now Appellant) sets up a defence depending upon certain facts, upon which there was much dispute at the hearing; it was impossible for the Court to come to any satisfactory conclusion upon the facts so stated. The Court adopts one or other mode of ascertaining the facts, which are not at that moment before it in a way to enable it to dispose of the case. It might have directed an issue: that is one of the

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arguments, that there ought to have been an issue. There might have been an issue, or it was competent to the Court to direct an inquiry. The Court directed an inquiry, and no complaint was made of the inquiry directed until all the subject-matter had been exhausted and the party now complaining had failed in establishing the facts in his favour. I think this House will not listen to a complaint, under the circumstances of this case, of a decree merely directing an inquiry, after all that has taken place, and I think the inquiry itself was perfectly proper; and upon both grounds therefore that appeal, that is, the appeal against the original decree, has no foundation to rest on, and therefore must be dismissed, with costs.

The other appeal, the first in point of date, that is, the first presented, though relating to a subsequent part of the case, complains of two orders; first, of the order of the 27th of February 1836, by which exceptions were allowed to the report of the 2d of July 1835;—Now the effect of allowing those exceptions was to decide that there had been no alteration in the agreement after the commencement of the partnership—secondly, of another order of the 17th of *December* 1836, which allowed the second exception taken to the report of the 15th of *February* 1836, by which the Master had reported that all sums received by *Toulmin & Copland* from their customers ought to be applied in repaying the advances of the firm, and the surplus only applied in payment of the debts due to the former firm. The effect, therefore, of this order was to establish the converse of that proposition as to the rule to be followed in taking the accounts.

As to the order of the 27th of *February* 1836, it is to be observed that *Copland's* affidavit rested alto-

gether upon the new agreement having been made on the assumption that the 40,000 *l.* good debts had not been brought into the concern by *A. Toulmin*. But this House having decided that such assumption was unfounded, the very ground on which the supposed existence of such new agreement rested failed; and after a careful examination of the evidence, I think there is no proof of any such new agreement. I lay aside all evidence of declaration and admission imputed to *A. Toulmin* or *Mr. Copland*, which are not stated in the pleadings, and which there was not therefore any opportunity of explaining or disproving. And in the absence of all direct evidence on the subject, either verbal or in writing, it can only be ascertained by reference to the evidence furnished by the very books themselves. The books do not contain any division of profits. And here I may observe, that a supposed new contract, according to the proposition of the Appellant, must take place at some subsequent period. Now there is a total absence of any trace in the books of any altered mode of keeping the accounts. If the parties had been originally connected together according to a certain agreement as to the division of profits, and at a subsequent period had agreed to adopt a different mode of dividing the profits, it is hardly to be supposed that the accounts would have gone on and been found to have been kept during the whole of that period in the same manner, if that altered contract had taken place between the parties. The books are uniform, following the same system from the beginning to the end, and no alteration is to be found in the keeping of the accounts at any alleged period when the new contract is supposed to have been entered into.

The books do not contain any division of the profit and loss as to the general business between the par-

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ties, and so far they afford no evidence of any new contract. But as to the particular items, they do show that certain expenses and losses were charged equally to the partners, that is, as to certain losses in the purchasing and selling of stock in the public funds, and that certain wines purchased by the firm were divided equally between the partners. But to this it is answered, that these purchases and sales of stock were not on the partnership account, but that they were speculations of the two partners as individuals, and that the losses were therefore properly charged in moieties to each of the two; and such appears to me to be probably the true solution; for if they were, in fact, partnership transactions, why were they kept separate from the other transactions of the firm, and why were the results carried to the account of each partner, when no such course was followed as to any of the other partnership transactions? It may also be observed, that if the parties were to bear the result of all the transactions in moieties, why were the losses on these stock transactions to be carried separately to the account of each partner? But if they were to bear these losses in moieties, and the result of the general business of the partnership in thirds, there was an obvious propriety in separating the results of these adventures from those of the general business. As to the wine which was divided between the parties, the answer given was, that that was so divided to meet the expenditure of entertaining the customers of the firm; and there seems some probability for this supposition. The reference in the accounts to the house expenses, leads to this conclusion, and if any use could have been made of it for the purpose of showing a general division of profits in moieties, it would have been necessary to have shown that the same mode of divi-

sion applied to all similar purchases, which does not appear to be the case. The evidence, therefore, of a new agreement to divide the profits equally, in my opinion, wholly fails, and the order of the 27th of *February* 1836, appears to me to be correct, and that the exceptions to the report of the 2d of July 1835, were properly allowed.

As to the order of the 17th of *December* 1836, it establishes a rule for taking the accounts consistent with the ordinary course of business, and which the law assumes to be the course to be followed, unless there be proof of a contrary course agreed on between the parties. Certain debts due from the customers of the house to the former firm of *Richard & Abraham Toulmin* were by agreement between *A. Toulmin & Copland*, upon the formation of the partnership between them, transferred into the books of the new firm of *Toulmin & Copland*, and the transactions with such customers continued as before; monies were received on their account, and advances were made to them, or payments made on their account, without a distinct appropriation by the customers paying the money; at least that is the general course of business; in some particular instances there seems to be a particular appropriation, but generally without any appropriation by the customers paying the money, or any agreement between the parties prescribing a different course of appropriating the monies so received to the earlier debts. What then is the proof that there was any such agreement? And here again I must lay aside all declarations imputed to *A. Toulmin*, which are not stated in the pleadings. In the accounts of the customers the old and new debts constitute one account, and the balance struck is the result of the pending account; but it is said, that in certain pro-

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ceedings between *A. Toulmin* and the estate of his former partner, who had become a lunatic, he had represented that the monies so subsequently received were to be first applied in repaying the subsequent advances; but it will be found by the objection and exception of *A. Toulmin*, in the matter of the lunacy, that he endeavoured to support this proposition—although in the affidavit he states the contract, yet when he brought the matter before the Court he endeavoured to support the proposition on the ground of the custom of the trade, as applicable to that particular business, and not of any special contract for that purpose. But the decision of Lord *Eldon* (*t*) negatived any such contract, or any such custom, by deciding that as between those two branches of the firm—no doubt *A. Toulmin* being the nominal party as between himself and the estate of his late partner, yet there was abundant to show that *Copland* was a party and privy to the proceedings then carried on—Lord *Eldon* decided upon the evidence in that case, that the monies received were to be applied in payment of the older debts. He therefore negatived the two grounds set up for a contrary proposition, namely, that either by the custom of the trade or contract it was to be applied first in payment of the advances by the subsequent firm. I think, therefore, there is no proof of any special contract or any particular custom of the trade to support the proposition contended for by the Appellant, and the general rule of law is against it. So far, therefore, I think the order of the 17th of *December* 1836 is correct.

That order, however, allows the second exception, with an exception which I think very proper, but which

(*t*) *Ex parte Toulmin, Devaynes v. Noble*, 3 Merivale, 598 n.

is not here in question (u). It therefore allowed that part of the second exception, which asserted “that the firm of *Toulmin & Copland*, as between them and *A. Toulmin*, should be charged with the sums firstly applied, and with interest thereon from the times when they were respectively received to the 4th of *January* 1819, at the rate of five *per cent. per annum*, with annual rests.” The Master, by the report to which this exception was taken, after stating his opinion as to the manner in which he conceived the monies received ought to be applied, stated that he had forborne to take the account until this point was decided. Now the part of the exception, to which I refer, does not relate to the question of the manner of applying the monies received as raised by the report, but to the manner of taking the account, consequential indeed perhaps on the decision of the first point, but which was not directly raised by it, an account which the Master has stated he had forborne to take. It is impossible, therefore, to say that the Master, if he was right in making a separate report at all, as to the mode of applying the receipts, ought to have reported in the terms of the latter part of the second exception to which I have alluded. I by no means wish to be understood as expressing any opinion against the proposition so raised; but before the account is taken, and without some more information as to the fact, I think it would not be safe for this House, *a priori*, to lay down that or any other proposition beyond what is necessary to decide the question raised by the report, and I have before said, that it is not regular by an exception to raise a proposition foreign to the subject-matter of the report excepted to. I think,

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(u) *Vide ante*, p. 357.

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therefore, that there should be a variation of the Order of the 17th of *December* 1836, so as to make it allow the second exception, except that concluding part of it to which I have alluded ; not for the purpose of expressing any opinion against the proposition so raised, but because I think it was not regular to express any opinion in that state of the case and on that exception to such a report.

I have had some doubt whether this alteration in the order ought to protect the Appellant from the payment of the costs of the appeal. This objection to the order is not put forward as a ground of appeal in the printed case, but it was insisted on at the bar, and I think it is of some importance. On the whole, therefore, I think that the Appellant should pay the costs of the second appeal, and of so much of the first appeal as complains of the order of the 27th of *February* 1836, and that each party should bear their own costs of the remaining part of the first appeal.

[It was accordingly ordered that the appeal against the decree (the second appeal) be dismissed, and that the decree be affirmed, with costs to be paid by the Appellant.

And as to the first appeal, it was ordered, that the order of the 27th of *February* 1836 be affirmed, and that the order of the 17th of *December* 1836 also be affirmed, except so far as that order allowed that part of the second exception which asserts “ that the firm of *Toulmin & Copland*, as between them and *A. Toulmin*, should be charged with the sums so firstly applied, and interest thereon from the times when the same were respectively received, to the 4th of *January* 1819, at the rate of 5*l.* per cent. per annum,

with annual rests," which part of the said exception is overruled, but without prejudice to any future question as to charging such sums and interest. And it is further ordered that the Appellant pay the Respondent the costs of so much of the said appeal as complains of the said order of the 27th of *February* 1836, and that each party pay his own costs with reference to the remaining part of the said appeal; and it is further ordered that, with this variation, the cause be remitted to the Court of Exchequer.]

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JOHN GALWEY - - - - - *Plaintiff in Error.*

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GODFREY THOMAS BAKER - - *Defendant in Error.*

1840 :
July 28.

A CLAUSE in an indenture of lease reserving, out of the demise, to the lessor "all wood and underwood, timber and timber trees, standing, growing, or being thereon, or at any time thereafter to stand or grow thereon, with full and free liberty of ingress and egress to take and carry away the same," applies only to trees standing when the lease was granted, and not to those afterwards planted by the tenant.—Its operation is so restricted by the 23 & 24 Geo. 3, c. 39.

*Lease,
Covenants in.
Timber Trees.
Practice.*

Quære—Whether a judgment given by the Court of Queen's Bench in Ireland, on a bill of exceptions tendered to the charge of a Judge of that Court in an action brought and tried in that Court, is not in itself irregular and erroneous?

THIS was a writ of error on a judgment of the Court of Exchequer Chamber in *Ireland*. *John* and *Edward Galwey*, being seised in fee of and in the lands of *Lota*, and the dwelling house thereon, by indentures of lease and release, dated the 28th and 29th of *October* 1789, demised unto Sir *Richard Kellett*, knight, the said dwelling house and lands of *Lota*, to hold the same unto the said Sir *Richard Kellett* and his heirs for the term of three lives therein

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named, with covenants for perpetual renewal, reserving a certain rent therein mentioned.

The indenture of release contained a clause in the words following; viz. "Saving and always reserving out of the said demise unto the said *John Galwey* and *Edward Galwey*, and to the person or persons who shall from time to time be entitled to the reversion in said lands, all mines, minerals, and royalties happening or being thereon, and also all wood and underwood, timber and timber trees, standing, growing, or being thereon, or at any time thereafter to stand or grow thereon, with full and free liberty of ingress and egress, to take and carry away the same."

John Galwey, the plaintiff, had since become seised of the reversion in fee of the said premises, subject to the demise for the term of lives, which term is still subsisting.

Some time after the execution of the indentures one *William Massey Baker* became seised of the estate and interest of Sir *Richard Kellett* in a part of the demised premises, by assignment, and planted divers timber trees thereon, and duly registered the same pursuant to the provisions of the *Irish* statute of 23 & 24 *Geo.* 3, chap. 39 (a), and shortly after died, leaving *Godfrey Thomas Baker*, the defendant, his heir, who thereupon became seised of the premises so assigned as aforesaid for lives renewable for ever; the reversion in fee belonging to the plaintiff. The defendant cut down and sold certain of the trees (of the value of 1 l.) which had been planted and registered by *William Massey Baker*, whereupon the plaintiff, in Hilary term 1835, brought an action of trover in the Court of King's Bench in *Ireland* to recover the value of the said trees, and the defendant

(a) See *post*, 382.

having pleaded the general issue, the action came on to be tried on the 21st day of *March* 1835, at the assizes for the county of the city of *Cork*, before *Richard Wilson Greene*, esquire, one of his Majesty's Serjeants at Law; and the several matters and things hereinbefore stated having been proved or admitted, the counsel for the plaintiff contended that the clause in the indenture of the 29th day of *October* 1789, reserved to the reversioner the property in all trees at any time growing upon the demised premises; but the counsel for the defendant contended, that notwithstanding that clause all timber trees planted after the execution of the indenture were, under the provisions of the 5 & 6 *Geo.* 3, c. 17 (*b*), and 23 & 24 *Geo.* 3,

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(*b*) Intituled, "An Act for encouraging the planting of Timber Trees," by which it is recited that, "Whereas the distress this kingdom must soon be in for want of timber is most obvious: And whereas it is equal to inheritors whether tenants do not plant or have a property in what they plant;" and then enacted, "That from and after the first day of September one thousand seven hundred and sixty-six, tenants for lives renewable for ever, paying the rents and performing the other covenants in their leases, shall not be impeachable of waste in timber trees or woods which they shall hereafter plant, any covenant in leases or settlements heretofore made, law or usage, to the contrary notwithstanding.

"2. Be it enacted, that if from the time aforesaid any tenant for life or lives, by settlement, dower, courtesy, jointure, lease, or any office, civil, military, or ecclesiastical, impeachable of waste, or any tenant for years exceeding twelve years unexpired, shall plant sally, ozier, or willows, the sole property of such shall, during the continuance of the term, vest in the tenant, and he may cut and fell the same, under the restrictions hereinafter mentioned; and if such tenant shall plant any timber trees of oak, ash, elm, firs, pine, walnut, chestnut, horse chestnut, quicken or wild ash, alder, poplar, or other timber trees, such tenant during the term shall be entitled to a house-bote, plough-bote, cart-bote, and car-bote of such trees by him planted; and at the expiration of the term, or where such trees shall have attained maturity, which shall first happen, shall be entitled to the said trees, or the value of them, according to the directions hereinafter mentioned, any covenant heretofore made, law or usage to the contrary notwithstanding.

"Provided always, that each person so planting shall within six months next after such planting lodge with the clerk of the peace

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c. 39 (c), the property of the tenant who planted them, and did not belong to the reversioner, and sub-

of the county where such plantation is made, a certificate under the hand of the tenant, containing the number and kind of the trees planted, their height and years growth at the time of planting, and a clear description of the places and manner wherein they shall be planted; which certificate shall be kept on a separate file among the records of the county, and entered in an alphabetical book by the denomination of the land in the said county; and such certificate, or a copy thereof attested by the acting clerk of the peace, shall be evidence of notice of such plantation in all courts; to which book and certificate all persons may resort during each quarter sessions to be held for such county, without any fee."

(c) Intituled, "An Act to amend the Laws for the encouragement of planting Timber Trees;" which, after reciting that, "Whereas the laws for the encouragement of tenants to plant timber trees have proved ineffectual," enacted, "That from and after the passing of this Act any tenant for life or lives, by settlement, dower, courtesy, jointure, lease, or office, civil, military, or ecclesiastical, impeachable of waste, or any tenant for years exceeding fourteen years unexpired, who shall plant or cause to be planted any timber trees of oak, ash, elm, beech, fir, alder, or any other trees, shall be entitled to cut, fell, and dispose of the same or any part of the same, at any time during the term: Provided always, that any tenant so planting or causing to be planted shall within twelve calendar months after such planting lodge with the clerk of the peace of the county or county of a city where such plantation shall be made, an affidavit, sworn before some justice of the peace of the said county, reciting the number and kind of the trees planted, and the name of the lands, in form following:" 23 & 24 Geo. 3, c. 39, s. 6.

By s. 7, it was enacted that "any tenant may sell his or her right, title, and property in said trees or coppices, or any part of the same, to any person under whom he or she may derive mediately or immediately, and that the person so purchasing may have all the rights, titles, and properties, and privileges therein which are, or by this Act shall be secured to the said tenant."

By s. 8, it was provided "that no sale or transfer of the same shall be deemed good in law, unless and until the same shall be done in writing, and an attested copy of such writing lodged with the clerk of the peace," who shall register the same: "and if the head or principal landlord shall so purchase the said trees or coppices from an under tenant having a right to sell the same, then from and after the registry of the sale as aforesaid, the said trees shall belong to the landlord, notwithstanding any intermediate term that may exist between the term of the said tenant and the estate of the said landlord."

By s. 12, it was declared that the surrender of a lease for the purpose of taking a new one should not be considered an expiration

mitted to the learned Judge that the defendant, upon the facts proved and admitted, was entitled to a verdict. The learned Judge, however, was of a different opinion, and directed the jury, if they believed the evidence, to find a verdict for the plaintiff for the value of the timber so cut down; whereupon the jury found a verdict for the plaintiff, damages 1*l*. The counsel for the defendant tendered a bill of exceptions, to which the Judge put his seal, and the case was afterwards brought on for argument before the Court of King's Bench in Michaelmas term 6 *Will. 4*, when that Court gave judgment for the defendant. The plaintiff sued out a writ of error to the Court of Exchequer Chamber in *Ireland*, by which the judgment of the Court of King's Bench was unanimously affirmed, and the present writ of error was then brought.

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The *Attorney-general* (Sir *J. Campbell*), for the Plaintiff in Error:—There has been one great blunder committed in this case. The action was brought in the Court of King's Bench, and the bill of exceptions was argued before that Court. In fact, the bill of exceptions was treated as if it was a special verdict. This was clearly erroneous: if the proceeding had been regular, the verdict given before the Judge at *Nisi Prius* would have gone before the Court of Error; and then, if that Court thought that the verdict could not be sustained, it would have awarded a *venire de*

of the term so far as regarded that Act, but that every renewal should be considered a further continuance of the original term, and the tenant should be entitled to enjoy all the benefits of the planting, &c. given by the Act in the same manner as if the additional term had been contained in the original lease.

S. 21 declared that "nothing herein shall be construed to extend or relate to any trees planted or to be planted in pursuance of any covenant contained in any lease, nor to affect or invalidate any such covenants."

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novv. But here the course has been quite different, for the Court of Error has set aside the verdict, and ordered a judgment to be entered for the defendant. This course is itself erroneous. The Statute of Westminster (13 *Ed.* 1, stat. 1, c. 31), which first gave a party the right to a bill of exceptions, was introduced into *Ireland* by *Poynings'* law, and the law on bills of exceptions therefore must be the same in both countries.

Sir *F. Pollock*, who appeared for the Defendant in Error, said that he did not know whether the fact would appear on the record, but he understood that there was a written consent given, when the case came before the Court of King's Bench, that it should be treated as a special verdict.

Lord *Brougham* :—The case comes before us on this record as a writ of error on a judgment given on a bill of exceptions, which is all that we can know about it. By that it appears that a judgment of this extraordinary description has been given on this bill of exceptions. If any consent of the kind spoken of was given, a special verdict might have been substituted for the bill of exceptions.

The *Attorney-general* :—That could have been done. If this judgment had been reversed a *venire de novo* might have issued, returnable in the Court of King's Bench. The course pursued here was clearly erroneous. In *Nepean v. Knight* (*d*) the rule is distinctly laid down. In delivering judgment there, Lord *Denman* said (*e*): "For these reasons, we are of opinion

(*d*) 2 *Mee. & W.* 894.

(*e*) *Id.* 914.

that the learned Judge's direction to the jury, in respect of which the lessor of the plaintiff tendered a bill of exceptions, was correct, and that the verdict ought to have been found for the defendant; but as we cannot order it to be so entered, the result is that the verdict found for the lessor of the plaintiff must be set aside, and a *venire de novo* awarded." On this ground alone the judgment must be reversed.

But besides this, it is clear that the exceptions cannot be maintained, and that the direction at *Nisi Prius* was right. The provisions of the covenant are direct enough; but then there are two *Irish* statutes, on which it is said that doubts may arise whether the plaintiff is entitled to recover. The plaintiff is the reversioner; the defendant the tenant *pur auter vie* of an estate in *Ireland*, and has cut down timber from the demised premises. The question is, whether under the 5 *Geo.* 3, c. 17 (*f*), and 23 & 24 *Geo.* 3, c. 39 (*g*), such a person can cut the timber which he or his ancestor has planted. At first sight, the terms of the statutes, especially the later one, may appear to give the tenant this right; but even in that statute itself there is a restriction on his right; for the 21st section provides, "that nothing herein contained shall be construed to extend or relate to any trees planted or to be planted in pursuance of any covenant contained in any lease, nor to affect or invalidate any such covenants."—[Lord *Brougham*: Does not that mean such covenants as are antecedent, such covenants as those by which the tenant expressly undertakes to plant the property?—It is submitted that the section cannot be so restricted, but that it applies to any covenant respecting the planting of trees. There are

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(*f*) *Irish Statutes*, vol. ix.

(*g*) *Id.* vol. xiii.

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many such covenants in reservation or exception. The present is one of that sort. There may be a covenant of reservation, which would still reserve to the lessor all the right in the timber grown during the term. There is no question that by the terms of the statute the tenant may sell the timber when grown; then why may he not sell his right to it before it is planted? The question here is whether there is any objection, in point, of law, for the lessor, after these Acts passed, by apt words to reserve to himself the right to timber trees growing on the premises, or planted there during the term. If an Act of Parliament grants to a tenant a particular right, there may still be an exception introduced in a case which, by agreement between the parties, may put an end to that right. One species of minerals may be reserved and not another. Those which are between the surface and the centre may be parcelled out, and, in fact, the rights of the two parties may be strictly dependent on the agreement into which they have chosen to enter. But it was objected in the Court below, that though there may be a reservation of things existent, there cannot be one of things non-existent; so that the timber growing may be reserved, but not the timber to grow, for that the exception must come out of the subject-matter demised.—[Lord *Brougham*: How do you reserve rent to become due? That may be payable in corn to be grown, as well as in monies numbered.]—It is quite clear that that objection made in the Court below is untenable; for Sir *F. Barrington's* case (*h*) distinctly shows that there may be a grant or reservation of trees growing or to grow. Then in *Stanley v. White* (*i*), a belt of trees grew

(*h*) 8 Rep. 271.

(*i*) 14 East, 332.

round Sir *T. Stanley's* estate; the soil in which they grew was not in him, but was in the owner of the adjoining land, and it was held that they might belong to his freehold, for that there might have been a conveyance of the soil, with a reservation of the trees growing and to grow. If there may be a reservation of trees to grow in future, where, as in that case, there was a conveyance in fee simple, there may also be one where there is a reversion still existing in the lessor. If a lease does not reserve mines the lessor cannot maintain trespass for digging the soil and opening the mine, but he may maintain case for an injury to the reversion. But if there is a reservation in a lease of timber or minerals, trespass may be maintained by the lessor. Then as it is clear that such a special reservation may be made, and as a reservation has been made in this case, the question is whether here it is restricted to trees existing at the time, or will include those which were thereafter to be planted. The words of the lease clearly include all trees growing and to grow. *The Earl of Cardigan v. Armitage* (*k*) was cited on the other side in the Court below, but it is difficult to see how it can apply to the present case, and the same observations may be made with regard to *Bullen v. Denning* (*l*). At the time of the making of this lease the lessor was the owner in fee simple; he might therefore grant a part or the whole of his right over the estate. He has only granted a part. Had it not been for this express reservation in the lease the property in the timber planted would, by the operation of the statute, have passed to the lessee. But here is an express reservation to those entitled in reversion.—[The *Lord Chancellor* : This reservation is in

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(*k*) 2 Barn. & Cres. 197.

(*l*) 5 Barn. & C. 842.

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derogation of the grant, but it did not require the grant to give the tenant the right to the trees in question.]—But the reservation is not inconsistent with the grant, for if it was it would be null and void. It is a particular reservation of something which the lessor has a right to reserve, and is therefore good. It was not denied in the Court below, and is even admitted here on the face of the reasons presented to the House, that the trees growing from old stocks belong to the lessor. Then why not the rest? The direction at *Nisi Prius* was good, and the judgment must be reversed.

Sir *W. Follett*, on the same side:—The most important part of this case will be the construction of the second of these statutes, on which as yet no decision has been given in *Ireland*. The provisions of the statute are not intelligible if they are to be taken to apply to leases existing at the time of the passing of the Act, and not meant to control contracts or covenants which might be entered into after the passing of the Act. It was supposed in the Court below, that the first Act did not apply to leases made after the passing of that statute. The whole question, therefore, depends on the 23 & 24 *G.* 3, c. 39. That statute gives to the tenant the power to cut or fell any timber trees which he may plant. What is the effect of that statute? Is it intended that it shall interfere with contracts or covenants afterwards entered into? If not, then here is a distinct covenant defining the rights of the parties. If there was no covenant, the trees under the common law would have belonged to the landlord. But then the statute interposes for the benefit of the tenant. But that leaves either party at liberty to give up his right to the other; a tenant may, if he pleases, covenant to give up

his right to house-bote. The only question therefore is, whether there has or not been any such contract in this case. In this lease there is, first, a reservation of all trees, and then a covenant that all improvements, which must include trees planted, shall belong to the lessor. If a lease contains a covenant on the part of the tenant not to cut or fell trees, the next question is whether the landlord has not a right to reserve to himself an action if the trees are cut. If the trees are the property of the landlord while on the land, they are equally so when they have been wrongfully cut by the tenant. The reservation in the lease made them his property. According to Lord Coke (*m*), "Reserving sometime hath the force of saving or excepting, so as sometime it serveth to reserve a new thing, namely, a rent, and sometime to except part of the thing *in esse* that is granted." The words of exception in this lease are strong; parties must be supposed to know their legal rights, and if the tenant did not mean to allow his landlord to reserve a right to all the trees that might be planted, he ought to have stated his intention. The landlord is to have the right to enter and cut and take away the trees; there is no distinction made as to any particular sort of trees, and there is nothing to show that the words used have not their ordinary meaning. One of the learned Judges in the Court below said that it might be doubtful whether the tenant intended to give up his established rights. It might be so if the language used here did not sufficiently show that that was the case.

As to the form of the judgment here, it is clearly erroneous. The Court of Error had no right to direct the verdict to be entered as found by the jury, when

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(*m*) Co. Litt. 143*a*.

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it appeared on the record itself that the verdict was not so found. An *Irish* statute of the 28 *Geo.* 3 (*n*) will be relied on by the other side to show that the proceedings here are correct. The great object of that statute is to take away from the Judge the necessity of sealing the bill of exceptions, and to render his signature sufficient. It is true that the statute says that the Court may make such order as is agreeable to justice; but that does not give a Court of Error the right to enter a verdict. There must be a clear enactment to enable the Judges to place themselves in the situation of a jury.—[Lord *Brougham*: A special verdict is not a verdict by the Court, but the Court directs how it is to be entered, on the finding of the jury. The *Lord Chancellor*: But that is not assigned here as error.]—The assignment is in general terms that the judgment is erroneous; the statute does not cure the material objection of directing the verdict to be entered. So that even if the direction of the Judge at *Nisi Prius* was wrong, there ought to be a new trial; but that direction was right, and the verdict for the plaintiff ought to stand.

Sir *F. Pollock*, for the Defendant in Error:—The object here was to save expense in putting this case in the Court below into the shape of a special verdict instead of that of a bill of exceptions. It is impos-

(*n*) 28 *Geo.* 3, c. 31, s. 1, after reciting that the carrying of a cause by bill of exceptions to a superior Court is a cause of great expense, enacts “that it shall be sufficient if the Judge to whom such bill of exceptions shall be tendered sign the same, and that it shall not be necessary for him to put his seal thereto, and that such bill of exceptions so signed shall remain with the clerk of *nisi prius*, and be incorporated in the *postea* and be returned therewith to the Court in which the action is brought, which Court shall have authority to examine the same, and give judgment thereon, or make such order, either by arresting the judgment, granting a *venire facias de novo*, or otherwise, as shall be agreeable to justice.”

sible for this House, after judgment in two Courts, to avoid coming to the conclusion that there was an arrangement between the parties as to the form in which judgment should be prayed. But the words of the statute amply justify this judgment. The words "or otherwise" enable the Court to give a judgment on the very right and justice of the case, even though the form of it should be that of a bill of exceptions, when in substance it is a special verdict. The practice of the Court is according to that construction of the statute.—[Lord *Brougham*: But the practice is not shown to us.]—The practice of the Courts must be evidenced by what the Courts have done in this case. The Courts of King's Bench and Exchequer Chamber have in this very instance shown what is the practice. What better authority can there be for showing what is the practice, than the fact that these two Courts have pursued this course in the present instance? —[The *Lord Chancellor*: And the Plaintiff in Error has not raised the objection in his statement of errors.] —Which shows that in the Courts in *Ireland* the practice must be considered as established. This House will not favour an objection which must either have been abandoned or considered untenable in *Ireland*. That practice must be taken to give the true construction of the statute, or at all events this House will not, without being clearly satisfied that that is not the case, deprive the Court of the power of dealing out justice to the defendant as well as the plaintiff, when both have shaped the record in such a way that the real merits of the case may be seen. It is clear that it was intended that by this Act the Judges should have a larger power than they possessed by virtue of the Statute of Westminster. In the first place, the same Court as that out of which the writ

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proceeds, may examine the bill of exceptions; in the next, it may arrest the judgment, and it may do so on what occurs at the trial, and on what is shown on the bill of exceptions.

There is nothing in the pleadings here to import that there was a planting of trees by the defendant or his ancestor, or a registering of them under the statute, but if the bill of exceptions puts the Court in possession of the real merits of the case, it was intended by the statute that the Judges might adopt any course that justice might appear to them to require. They may, therefore, as it appears proper to them, either arrest the judgment or grant a new trial, or they may give judgment thereon on the record, as it stands before them, or direct a *venire facias*, "or otherwise, as shall be agreeable to justice." These latter words must have some meaning. What is that meaning? It is that the Courts may give judgment for the defendant if there is anything to call for it; that they may do anything which will be agreeable to public justice. Where the object of a statute is, as it is here, to prevent delay and to save expense, and powers are given to the Court for that purpose, this House will construe that statute in as large and ample a manner as may be necessary for effectuating the object of the Legislature.

Then as to the principal question in the case; it may be true that a reservation of timber in a lease may apply to all timber, whether growing on old stocks or raised by the labour of man. *Barrington's case*(*o*) may be admitted as undisputed law, and so may *Stanley v. White* (*p*), which proceeded upon it, and yet the argument attempted to be raised upon

(*o*) 8 Rep. 271.

(*p*) 14 East, 332.

them would not be true. In the first place, they are not precisely in point with the present case. But in the next, this case is wholly independent of them, and depends on the construction of the two statutes for the encouragement of the growth of timber; and on the construction of those statutes it is clear, that unless there was a distinct renunciation of the timber by the tenant, the trees planted by him must be his property. Now, in the first place, there can be no such thing as the renunciation of a right created for a great public purpose.—[Lord *Brougham* : Is it quite clear that that argument can be supported? Suppose the Legislature should say that all game shall belong to the tenant, could not the tenant renounce it? The Legislature trusts to people's attention to their own interests, and vests rights in a party, but does not prevent him from disposing of them.]—In this case something more than a mere private right was created. A great public purpose was secured by creating a private right. Nothing but express words of renunciation can surrender that right. Generally speaking, it is undoubtedly true that a right may be abandoned by a party, as a pecuniary right and the like, but that is not true with respect to all rights. For example, no man can voluntarily part with his right to personal liberty; he cannot give another the power to detain him in prison, or to do him some bodily harm. There is but one way in which the landlord can secure to himself the right to these after-planted trees, and that is by making the tenant covenant to plant them. No other reservation whatever can operate to contravene the policy of these two statutes.—[Lord *Brougham* : The 5 & 6 *Geo.* 3 strikes at leases already made, but does it not leave landlords and tenants to deal with each other for the future?]

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—It does not. With respect to past contracts, i required the express language of the Legislature t meddle with them, but with respect to all futu~~re~~ leases, as it was clear that, if made in contravention~~o~~ of the statute, they would be contrary to law, it w~~as~~ not deemed necessary to mention them.—[Lo~~rd~~ *Brougham*: Does not the 16th section of the lat~~est~~ statute affect your argument?]~~—~~That is in the seco~~nd~~ statute, and may be observed on presently. As to t~~he~~ first statute, it is clear that that extends to futu~~re~~ leases, and that if any tenant should make any cov~~en~~ant that any timber he may in future plant shall ~~be~~ the property of the landlord, such covenant will ~~be~~ void as contrary to the policy of the statute. The~~re~~ are many cases where protections are thrown round individuals for the purposes of public policy, an~~d~~ where those individuals cannot by any arrangement~~o~~ of their own get rid of those protections. The publ~~ic~~ purpose must be served at all events. Minors an~~d~~ married women are instances of this sort, and so ar~~e~~ persons whose acts are affected by the usury law~~s~~. Now in these statutes the declaration that the sol~~id~~ property in the trees planted shall be in the tenan~~t~~ for life or years, and the fact that liberty is expressly reserved to the reversioner to purchase the tenant's right, shows how absolutely that right is given. No~~t~~ is his right the less certainly vested because it is re~~stricted~~ to the continuance of the term. But then ~~it~~ it is said that the 16th clause of the statute affects the tenant's right. That clause applies to no covenants but such as are covenants to plant imposed by the lessor on the tenant. If the effect of the statute may be got rid of by a reservation or covenant, the 16th section is mere surplusage, for if the tenant would be bound at all events to do what is there supposed to be

done in consequence of an express covenant, that section was at best quite useless. On the other hand, is it not clear that the maxim, *expressio unius est exclusio alterius*, must be applied, and that this one case of trees planted under a covenant to plant, being thereby excepted from the operation of the statute, all trees planted without such a covenant must be taken to be within the statute? As an encouragement to plant trees, the Legislature says that all trees may be cut down by the persons who planted them, and the only exception is when the trees are expressly planted for the benefit of the landlord. In that case what the tenant did would be matter of bargain, and the purpose of the statute would be fully answered. The 16th section may be read thus: "that nothing herein contained shall extend to trees planted according to a covenant for that purpose, but that as against the object of this Act all other covenants shall be void."—[The *Lord Chancellor*: And the statute is so anxious to reserve to the tenant the right to the trees, that he is only entitled to sell them to the landlord under certain restrictions.]—It might be contended in general terms that the statute meant to contravene all past and all future covenants, except those of a special kind. But it is not necessary for the purposes of this argument to go to that extent. To effect the purpose insisted on by the other side, the words of the covenant ought to have been much stronger than they are. They might have been to this effect, "although planted and registered by the tenant in pursuance of two statutes of the 6 & 24 *Geo.* 3." Such a covenant might have overcome the force of these statutes, but none other could produce any such effect. The case of *The Earl of Cardigan v. Armitage*(*q*) was cited by Mr. Justice

(*q*) 2 Barn. & Cres. 197.

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Bayley, in *Bullen v. Denning* (r), for the principle that where there was any reasonable degree of doubt as to the meaning of an exception in a lease, the words of the exception, being the words of the lessor, were to be construed favourably to the lessee, and against the lessor. The clause in this lease is only that which was in leases before the statute, and there can be no doubt that if these words had been found in a lease made before the year 1765, they would have been abrogated by force of that statute. All the best writers agree that where there is a distinct grant by the lessor, or by the Crown itself, and afterwards an exception which destroys such grant, such exception is, even in the case of the Crown, void, and the grant is valid. On the whole it is clear in this case, that in the first place the Court of King's Bench had a right to give the judgment it has given: in the second, that the right of the tenant being introduced to favour a great public object, it was not intended that the tenant by any voluntary act should strip himself of the right thus given, or deprive himself of the advantage which the Legislature had conferred upon him for the purpose of inducing him to plant trees on his land: thirdly, that the language of the covenant being of such a nature as was in use before these Acts passed, it must be at least doubtful whether it could ever have been intended to operate upon these statutable rights: and lastly, the doctrine in *Bullen v. Denning* is applicable, and the language and intention of the parties being doubtful, the tenant is entitled to the advantage of construction in his favour, and the more so as such construction will best effectuate the object of these important public statutes.

(r) 8 Barn. & Cr. 847.

The *Attorney-general*, in reply :—The first question now is, whether the judgment can be supported on the bill of exceptions. The reference, by the other side, to the agreement, shows that the course adopted here was not according to the practice of the Court. The words in the statute, “as should be agreeable to justice,” do not give a Court of Error power to set aside a verdict given in the Court below. All that the statute requires here is, that certain forms should be observed. Then as to the principal point: If the reservation here was of all the trees growing and to grow, there would be no distinction between trees which were planted by the lessee and those which grew spontaneously during his term. That would be considered in this country as equivalent to a conveyance of the fee. Then suppose that this was found in a lease for years *Bullen v. Denning* is an authority under such circumstances. It may be conceded for the purposes of this argument, that the statute gives the tenant for life the same rights as to this matter as would belong to the tenant in fee. But even then he would not have a right to cut and convey away these trees. Now it is clear that a tenant for life cannot be in a better situation than a tenant in fee simple. The right, therefore, claimed here, is more than the law will permit.

The *Lord Chancellor*:—On the facts of this case, as they appeared at the trial, the learned Judge was of opinion that the landlord was entitled to the trees. The counsel for the defendant then tendered a bill of exceptions, as he was entitled to do under the *Irish* statute. The Court of King’s Bench was of opinion against him, and proceeded to deal with the matter as to that Court seemed right. It is very probable that the form of the proceeding was not brought to the

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consideration of the Judges, but when the case was brought before the Court of Exchequer Chamber, it is obvious that the defect, if any, in the mode of proceeding, must have been apparent on the face of the record: the Exchequer Chamber confirmed the judgment of the Court of King's Bench. It does not appear that the point of the objection to the form of the judgment was made before the Judges of the Exchequer Chamber, but that objection appears to have been first put forward in the argument at your Lordships' bar. If you should be of opinion that you ought to concur with the opinion of the Judge at the trial, it will not be necessary to consider the form in which the judgment was entered, for then the judgment itself, as given in the Court of King's Bench, would be reversed; but as I am at present advised, I think that it will be necessary for your Lordships to consider the form of the judgment, which certainly is not according to the form of judgments in this country, and the proceeding itself is one which never could have occurred here. It is desirable, therefore, that you should take such means as you possess to consider the question arising on the form of the judgment. The *Irish Act*, in some respects, alters the mode of proceeding, and gives power in matters relating to bills of exceptions; but whether it really alters the mode of proceeding so far as to justify the course here adopted, is a question that may be somewhat doubtful. It may, on this subject, be material to enquire what has been the usual course of proceeding in *Ireland*, and what has in this way been the interpretation put by the Courts on the statute. It is obvious that it is a wholesome exercise of power to prevent the unnecessary expense of the parties going down to another trial, where the result is settled by the law beforehand. But on the other

hand, it may be open to danger to give the Court this unchecked power of dealing with a bill of exceptions, and thus to withdraw the question from the jury and submit it in fact to the Court. The only thing now to be done is to adjourn the consideration of this case, for the purpose of making an inquiry into the practice.

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Adjourned for further consideration.

The *Lord Chancellor*:—Many cases have been referred to in the course of the argument at the bar of this House, as to what would have been the consequence of this condition in the lease, if the Acts on the effect of which we have now to determine had not passed. In the view I take of this case, it is not necessary to determine that question. The Acts in question altered the common law as to the right of lessors to the trees growing on their estates, such trees having been planted by the lessee, and he being required to register them according to certain forms provided in the Acts. [His Lordship read the sections of both Acts (s).] The second section of the 23 & 24 *Geo.* 3 declared the general title of the lessee to the timber, and the 7th section provided that he should be permitted to sell his right and property in the trees so by him planted; and the 21st section provides that nothing therein contained shall be construed to extend to any trees to be planted in pursuance of any covenant to that effect, nor to invalidate any such covenant. Such being the state of the law, the lease in question was granted; it was granted in 1789, and was for the

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(s) See *ante*, p. 381, 382.

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term of three lives; and it contains the following clause: "Saving and always reserving out of the said demise, unto the said *John Galwey* and *Edward Galwey*, and to the person or persons who shall from time to time be entitled to the reversion in the said lands, all mines, minerals and royalties happening or being thereon, and also all wood and underwood, timber and timber trees, standing, growing or being thereon, or at any time thereafter to stand or grow thereon, with full and free liberty of ingress and egress, to take and carry away the same." It was argued for the Defendant in Error, that under these statutes any contract between the lessor and the lessee, or any covenant by which trees to be planted by the lessee might be taken by the lessor, would be contrary to the policy of the statute, and therefore void. The 21st section of the 23 & 24 *Geo. 3*, seems to have been enacted with a view to guard against trees, planted in pursuance of a covenant for that purpose, being included in the general provisions of the statute. That possible mischief being thus guarded against, any construction of the other clauses of the statute, which would deprive the tenant of the right, and the public of the advantages intended to be conferred on both, under the provisions of this statute, ought to be strictly watched, and, unless such a construction should be forced upon the Court, ought not to be adopted. The second section, and indeed all the provisions of the statute, seem to establish that the property in trees planted by the lessee, and duly registered, shall be vested in him: but it is clear that he may dispose of such property if he thinks fit. Here the trees were planted and registered by the tenant, who held as lessee an interest in a lease. The lessor never had any estate or interest in them, unless he can maintain

a claim of that sort under the clause contained in the lease; and to do so he must show that the clause was effectual to give him a property in things which, but for such clause, never could have been his. In considering the terms of this clause, it must be assumed that there had been trees on the estate, and that they might have grown there under such circumstances as would have made them the property of the lessor, subject to the tenant's right to the enjoyment of them during the term; a right guarded by the circumstance that the lessor would have no right to enter on the estate, and cut the trees and take them away, during the continuance of the term. I have already said that we must so construe the Act as not to give the property of the lessee to the lessor, unless, on the covenant of the parties and the particular words of the Act, we are compelled to do so; for otherwise we shall be giving effect to a particular construction against the general object of the Legislature. The provision in the lease now under consideration, is a reservation out of the demise, not of a new interest, but of that which was part of the subject of the demise itself: it is a reservation of mines and minerals, and then of the timber of the estate, all of which were at the time the lord's property, and which are reserved to him by the lease. The object of the provision, therefore, was to secure to the lord a certain part of the property conveyed by the lease, and to do so effectually it was deemed necessary to give him a property in that which might afterwards be grown thereon, and words for that purpose were therefore expressly used. Now the question arises whether it was necessary for this purpose to assign to him that which would otherwise have been the pro-

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perty of the lessee? There is in the lease a right reserved to enter, and take and carry away trees. If this reservation applies to the trees which the tenant has planted, it would take from him a right and a benefit, without conferring any corresponding advantage on the lessor. It cannot be supposed that the tenant would plant trees if the lessor might at any time, and that too under the very terms of the lease itself, enter and cut them.

It is equal, whether the tenant does not plant trees, or has no property in those which he has planted. The Legislature itself has declared this proposition, and has made it the reason for passing the Act which is now submitted for our consideration. It seems to me that the clauses on which the Plaintiff in Error relies, were intended to secure for the inheritance the full benefit of the trees which have been previously planted, and which are in existence at the time of the making of the lease; but they do not attach to trees which have since been planted by the lessee, and which never were, and were not intended by the law to be the property of the lessor.

I shall not, my Lords, make any observation on the question of the alleged irregularity in the proceedings in the Court in *Ireland*, as the parties have asked for our judgment on the construction of the statute notwithstanding such irregularity. Being of opinion that the view taken by the Court below of the *Irish* Acts, and of this covenant in the lease, was the correct one, I move that the judgment of this House be given for the Defendant in Error, with costs.

Lord *Brougham* :—I entirely agree with the opinion expressed by my noble and learned friend. The

question can only arise on the supposition that the clause in the lease does reserve after-planted trees. But the intention of the Legislature, and especially the 21st section of the later of the two Acts of Parliament, show that the reservation must be most plain and distinct in order to effect such a purpose. The reservation must therefore be considered as a contract, and construed accordingly. It is admitted that the parties may contract in this manner so as to give the landlord the right to the timber even in cases of perpetual renewal, for the tenant may sell him such right. Has that been done here? What are the words in which the Plaintiff in Error has made this reservation? The reservation is of trees "at any time thereafter standing or growing." Do those words mean trees after-planted? They do not; such trees might never come into existence; there is no covenant to plant any trees, and therefore the 21st section does not apply:—they mean trees growing on the stools of old trees, trees which were in existence at the time of the granting of the lease, and which would therefore continue the property of the landlord, subject only to use during the term by the tenant. The other construction is absurd. Why should a person stipulate for a property in trees which might never come into existence; since, by making such a stipulation, he would in all probability prevent the tenant from planting them? The clause which confers the power of entering on the land, and taking and carrying away trees, does not apply to trees planted by the tenant; it refers only to those things in which the landlord had a legal vested right. He had such a right in the mines and minerals, and in the trees which were then—that is at the time of granting the

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lease—growing on the estate; and to them and to nothing else does this clause refer. I am therefore of opinion that the judgment of the Court below was right, and that we must decide in favour of the Defendant in Error.

It was accordingly ordered and adjudged that the said judgment given in the Court of Exchequer Chamber in *Ireland*, affirming a judgment of the Court of King's Bench in *Ireland* for the Defendant in Error, be affirmed; and that the record be remitted, to the end that such proceeding may be had thereupon as if no such writ of error had been brought into this House. And it was further ordered, that the Plaintiff in Error do pay to the Defendant the costs incurred in respect of the said writ of error, &c.

The Rev. THOMAS SMYTH, Clerk, and }
 THOMAS JAMES SMYTH (a Minor) - } *Appellants.*

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JOHN HYACINTH NANGLE and Others - *Respondents.*

AN agreement in a lease for lives, "that, upon the renewing or inserting of any life or lives, a certain sum shall be paid by the lessee, his heirs and assigns, to the lessor, his heirs and assigns," does not amount to a covenant for perpetual renewal.

*Lease for
 Lives.
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 Construction of
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 Issues.*

A tenant of lands in *Ireland*, under the seventh renewal of a lease, made in 1672, not in existence, but admitted to contain an agreement as to the amount of fine to be paid "upon the renewing or inserting of any life or lives," filed a bill for renewal against the lessor's assigns, and, referring to the recitals of that agreement in former renewals as evidence of the covenant contained in the original lease, prayed that that covenant be decreed to be a covenant for perpetual renewal. HELD, that the case so made, and the issues tendered by the bill, were confined to the construction of the agreement as to the amount of the fine contained in the lease of 1672, and identified by the reference to the recitals of it in the renewals; and did not warrant either of two issues that were directed to try, 1st, whether at or before the making of the lease of 1672 (which was previous to the Statute of Frauds in *Ireland*) there was an agreement between the parties for a lease of lives renewable for ever: 2dly, whether that lease contained any agreement or covenant for renewal, independent of the agreement as to the amount of the fine to be paid on inserting any life or lives.

The latter issue would be consistent with the bill, if it had prayed relief on the ground that, the original lease being lost, the dealings between the parties for 120 years justified an inference that it contained a covenant for perpetual renewal. But the draftsman was precluded by former proceedings from so framing the bill.

BY indenture of lease dated the 24th of *May* 1672, and made between *Henry Pakenham* of *Tullynally*, in the county of *Westmeath*, esq. of the one part, and *Bartholomew Cooper*, of *Mayne* in the said county, of the other part, the said *H. Pakenham* demised unto the said *B. Cooper*, his heirs and assigns, the town

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and lands of *Mayne*, containing or reputed to contain 148 acres profitable land, and 23 A. 0 R. 12 P. of unprofitable land, of the late *Irish* plantation measure, be the same more or less ; and part of *Fiermore*, containing 25 A. 2 R. 5 $\frac{1}{2}$ P. situate in the barony of *Fore*, in the same county ; To hold the same unto the said *B. Cooper*, his heirs and assigns, for the lives of the said *B. Cooper*, and of *Appollina Cooper* his wife, and of *Bartholomew Cooper* the younger, his son, and the survivor of them, at the yearly rent of 30*l.* for the first seven years, and the yearly rent of 33*l.* 6*s.* 8*d.* afterwards, payable half-yearly, &c. The lessee's part of this lease was long ago destroyed by fire, as hereafter appears, and the Respondents, in whom the interest in that lease is vested, insist that it contained a covenant for perpetual renewal. There was an indorsement on the lease, in these words: " And it is hereby agreed between the parties as aforesaid, that upon the renewing or inserting of any life or lives, there shall be paid by the said *Bartholomew Cooper* the father, his heirs or assigns, unto the said *Henry Packenham*, his heirs or assigns, the full sum of 16*l.* 16*s.* 4*d.* current and lawful money of *England*." That indorsement, the Respondents insisted, was made in consequence of some inaccuracy in the statement of the amount of the renewal fine, in the body of the lease, or to supply some omission in the covenant, alleged to be therein contained, for perpetual renewal.

Mr. *Cooper*, by virtue of the lease, entered into and enjoyed the lands therein comprised, and some time before the year 1713 he sold his interest therein to *Garrett Nangle*, the great grandfather of the Respondent, *John Hyacinth Nangle*, and conveyed the same to him by indorsement upon the back of his part of the original lease.

The estate and interest of Mr. *Packenham*, the lessor, in the lands of *Mayne* and *Fiermore*, became vested in his son, the Rev. *Robert Packenham*, who by indentures of lease and release, in the year 1706, for valuable consideration, conveyed his estate and interest and reversion in the lands comprised in the said lease of 1672, to *Thomas Smyth* (hereafter, for distinction, called *Thomas Smyth*, the first), the ancestor of the Appellants, by the description of "All that and those the town and lands of *Mayne*, containing 148 acres profitable land, plantation measure," together with other lands which are not the subject of this case. That *Thomas Smith*, by his will dated the 20th of *February* 1712, devised the fee and inheritance of the lands of *Mayne*, to his second son the Rev. *Thomas Smyth* (called *Thomas Smyth*, the second), for his life, with remainder to his first and other sons in tail, with remainder to the second son of testator's eldest son in tail, with remainders over. Upon the testator's death without altering his said will, the lands of *Mayne*, subject to the lease of 1672, became vested in *Thomas Smyth*, the 2d, for life, with remainders over, as in the will mentioned; and the lands of *Fiermore*, comprised in the same lease, remained in the *Packenham* family.

Appollina Cooper, and *Bartholomew Cooper* the elder, two of the lives named in the lease of 1672, respectively died about the years 1676 and 1696; and *Bartholomew Cooper*, the younger, became and continued to be the only surviving life in that lease, until the year 1719, when the first renewal of it was executed, pursuant to a decree of the Court of Chancery in *Ireland*, in a cause of *Nangle v. Smith*. *Garrett Nangle*, the ancestor of the Respondent, filed a bill in that Court in 1713, against *T. Smyth*, the 2d (the tenant for life of the lessor's interest, the person repre-

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senting the inheritance not being a party), and the bill stated, “ that the said *H. Pakenham* did, in *May* 1672, come to a treaty and agreement with the said *B. Cooper* (the elder) to make him a lease for lives renewable for ever, and that afterwards, on the 24th *May* 1672, in pursuance and performance of the said agreement, the said *H. Pakenham*, by deed, demised the said lands to the said *B. Cooper*, his heirs and assigns, for the term of three lives, as by the said lease, which was then in the possession of the plaintiff in that suit, would appear ;” and the bill also stated, “ that it was concluded and agreed, between the said *H. Pakenham* and *B. Cooper*, before and at the time of making the said lease for lives, that the same should be renewable for ever, to the said *B. Cooper*, his heirs and assigns, on the payment of 16*l.* 16*s.* 4*d.*, which the more plainly appeared by its being expressed in the said lease that it was thereby agreed upon between the said *H. Pakenham* and *B. Cooper*, that upon renewing or inserting any life or lives, there should be paid by the said *B. Cooper*, his heirs or assigns, the full sum of 16*l.* 16*s.* 4*d.* ;” and the bill further stated, “ that in consequence of the manner of wording the covenant or agreement mentioned in the said lease, the plaintiff could not have an action at law to compel the defendant to renew the lease, although it plainly appeared by the lease that it was the intention and meaning of the parties thereto that the same should be a lease for lives renewable ;” and “ that the person who drew the said lease was an unskilful person, and unacquainted with the terms and manner of drawing leases for lives renewable.” The bill prayed, “ that your suppliant may be relieved in the premises according to equity and good conscience.”

T. Smyth, the 2d, admitted by his answer, “ that

a covenant, in the words above mentioned (as in the indorsement), was contained in the lease of 1672;" and he stated, "that he had heard and believed that there was no other clause in the said lease relating to a renewal."

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The plaintiff in that suit proved, by the evidence of the Rev. *R. Pakenham*, "that he had sold the lands of *Mayne* to *T. Smyth*, the 1st, as subject to a lease for lives renewable, and that he had heard that the general reputation in the neighbourhood was that the said lease was renewable;" and the plaintiff further proved, by other witnesses, that all the body of the said lease was the proper handwriting of *Andrew Williams*, who was not a person skilled in drawing leases, but was a parish clerk.

Lord *Middleton*, then Lord Chancellor of *Ireland*, said, upon the hearing of the cause, "I am of opinion, upon the evidence in this cause, that the plaintiff is entitled to a renewal. Will the defendant consent to accept of the money that is to be paid for the two renewals, and that a reasonable time may be limited for the renewal for the future? If not, I will give judgment in it. Let the defendant consider of this proposal till to-morrow." On the following day, the cause having been again called on, the Lord Chancellor said, "I am of opinion that the plaintiff is entitled to a renewal of the lease, paying the fines, according to the covenant in the lease; and therefore I decree it accordingly." "The defendant is to renew to the plaintiff, for the two lives that are dead, at the fine of 16*l.* 16*s.* 4*d.* for each life; but I do not decree that it is a lease for lives renewable for ever, but leave the plaintiff at liberty to take his remedy to sue for a renewal after the determination of the three lives." It was accordingly decreed that the defendant should

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perfect to the plaintiff a lease or leases of the said lands of *Mayne* for the lives of *Thomas Nangle* and *Patrick Cashell*, in the room of the two lives that were dead, the plaintiff paying a proper proportion of the rent and of the fines for each life payable by the said lease in respect of the said lands of *Mayne*, regard being had to the lands of *Fiermore*; and it was referred to one of the Masters of the Court to apportion the rent and fines between the lands of *Mayne* and *Fiermore*. In the decree his Lordship declared that he did not establish that the said lease was a lease for lives renewable, or not.

By indenture of renewal, made in pursuance of that decree on the 8th of *April* 1719, between *T. Smyth*, the 2d, of the one part, and the said *G. Nangle*, of the other part, in consideration of the sum of 28*l.* 15*s.* 5*d.*, paid by *Nangle* to *Smyth*, for two renewal fines, or proportions of renewal fines, payable in respect of the said lands of *Mayne* (the rent and renewal fines having been then apportioned under the decree), *Smyth* added to the term of the original lease the lives of *Thomas Nangle* and *Patrick Cashell*, therein described, in place of the said *B. Cooper* and *Appollina Cooper*, deceased; and he, *T. Smyth*, the 2d, granted unto *G. Nangle* "the said part of the said lands of *Mayne*, containing 148 acres profitable land, and 23 A. 0 R. 12 P. of unprofitable land, of the late *Irish* plantation measure, be the same more or less, situate in the barony of *Fore*, and county of *Westmeath* aforesaid, to hold the same unto the said *G. Nangle*, his heirs and assigns, for the life of the said *B. Cooper* the younger, and for the lives of the said *T. Nangle* and *P. Cashell*, and the survivor of them, at the yearly rent of 28*l.* 10*s.* 3 $\frac{1}{2}$ *d.* of the then currency of *Ireland*, being the rent apportioned in respect of said lands of *Mayne*." This,

the first renewal of the lease of 1672, was registered in *Ireland*, and the memorial stated that it was “ annexed to a lease of lives renewable for ever.”

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Garrett Nangle soon afterwards died intestate, leaving *Hyacinth Nangle*, his grandson and heir-at-law, in whom the lessee's interest in the original lease became vested. *B. Cooper* (the younger), the last surviving life named in the lease, died between the years 1719 and 1752; and by indenture of renewal, dated the 5th of *May* 1752, *T. Smith*, the 2d, in consideration of 14*l.* 7*s.* 8½*d.*, released unto the said *Hyacinth Nangle* the said lands of *Mayne* with the appurtenances, in as full and ample a manner as he, *Hyacinth*, then enjoyed the same under the original lease and deed of renewal, to hold the same unto the said *Hyacinth*, his heirs and assigns, for the lives of the said *T. Nangle* and *P. Cashell* (the two lives named in the renewal of 1719), and of *George Prince of Wales* (the new life then added), and the life of the survivor of them; and by this indenture it was agreed between the parties thereto, “ that upon the renewing of any new life or lives, there should be paid by the said *Hyacinth*, his heirs or assigns, unto the said *T. Smyth*, the 2d, his heirs or assigns, the full sum of 14*l.* 7*s.* 8½*d.* current and lawful money of *England*.” This, the second renewal of the lease of 1672, was duly registered in *Ireland*.

Thomas Nangle, one of the lives named in the two renewals, died in or before 1754; and, by indenture of renewal, dated the 2d *March* in that year, *T. Smyth*, the 2d, in pursuance of a covenant for renewal contained in an original lease in this indenture recited, and in consideration of 14*l.* 7*s.* 8½*d.*, demised unto the said *Hyacinth Nangle* the lands of *Mayne*, to hold the same unto him, his heirs and assigns, for the lives of

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the said *P. Cashell*, *George Prince of Wales*, and of *Prince Edward*, his brother (the new life then added), and the survivors and survivor of them.

The house of *Hyacinth Nangle*, at *Streamstown*, in the county of *Westmeath*, was, shortly after the execution of the last-mentioned renewal, set fire to and burnt, and he and those of his family then in the house were murdered, and all his title-deeds, including the lessee's part of the lease of 1672, and the said several renewals, were destroyed. He left an only child, *Christopher Nangle*, to whom the lessee's interest in the lands of *Mayne* descended.

In the year 1764, *T. Smyth*, the 2d, died without issue, whereupon *Thomas Smyth*, the second son of the eldest son of the testator (*T. Smyth*, the 1st), became entitled to the lands of *Mayne*, for an estate tail, under the limitations of the will of *T. Smyth*, the 1st; and the said *Thomas Smyth*, called *T. Smyth*, the third, in 1765 suffered a common recovery of the lands of *Mayne*; and thereby acquired an estate in fee simple therein, subject to the said lease of 1672; and by indenture of release, dated the 8th of *May* 1766, he, in pursuance of a proviso contained in his marriage settlement of prior date, conveyed the said lands of *Mayne* to the use of himself for life, with remainder to his first and other sons in tail male.

Prince Edward (one of the lives named in the renewal of 1754) having died previous to the year 1768, by indenture of renewal, dated the 2d *April* in that year, and made between *T. Smyth*, the 3d, of the one part, and the said *Christopher Nangle*, a minor, by *John Lowther*, his guardian, of the other part, after reciting the lease of 1672, and the several renewals thereof, and that the said *T. Smyth*, the 3d, had, at the request of the said *C. Nangle*, by his guardian,

pursuant to the true intent and meaning of the said covenant for renewal, agreed to add a new life to the term of the said demise in place of *Prince Edward*; it was witnessed, that *T. Smyth*, the 3d, pursuant to the said covenant for renewal in the said original lease contained, and in consideration of 14*l.* 7*s.* 8½*d.* paid by the said *J. Lowther* as a fine for a renewal in respect of the said lands of *Mayne*, demised, &c. unto the said *C. Nangle* the said lands of *Mayne*, to hold the same unto him, his heirs and assigns, for the lives of the said *P. Cashell*, King *George* the 3d, and *William Henry* Duke of *Gloucester* (the new life added in place of *Prince Edward*), and the survivor of them, at the said yearly rent of 28*l.* 10*s.* 3½*d.* This, the fourth renewal of the lease of 1672, was duly registered in *Ireland*. The tenant's part of it was lost, but the contents appeared by the registered memorial.

By indenture of renewal dated the 25th *December* 1768, made upon the death of *P. Cashell*, the survivor of the lives named in the renewal of 1719, after reciting the lease of 1672, and the several renewals thereof, and that "the said *T. Smyth*, the 3d, had agreed to add a new life to the said indenture in place of the said *P. Cashell*, pursuant to the true intent and meaning of the said covenant for renewing the same;" it was witnessed that *T. Smyth*, the 3d, "in pursuance of the covenant of renewal, in the said original lease contained, and in consideration of the payment of the renewal fine of 14*l.* 7*s.* 8½*d.*, demised unto the said *C. Nangle* the lands of *Mayne*, to hold the said lands, &c. unto him, his heirs and assigns, for the lives of King *George* the 3d, *William Henry*, Duke of *Gloucester*, and of the said *C. Nangle* (then added to the term of the said indenture), and the sur-

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vivor of them, subject to the aforesaid yearly rent of 28*l.* 10*s.* 3 $\frac{1}{2}$ *d.* Of this, the fifth renewal of the lease of 1672, the tenant's part is in existence.

In *July* 1774, *T. Smyth*, the 3d, filed a bill in Chancery against *Christopher Nangle* and *Myles Dowdall*, an under-lessee of the lands of *Mayne*, stating, among other things, that by indenture of lease, dated the 5th *May* 1752, *T. Smyth*, the 2d, executed to *Hyacinth Nangle* a lease for 21 years, of Upper and Lower *Coole*, which expired on the 25th of *March* 1773; and that the lands of *Coole* adjoined the lands of *Mayne*, both lands being occupied by *Hyacinth Nangle* during his life, and afterwards by the said *C. Nangle*, under the said several indentures; and that *Hyacinth Nangle*, and the guardian and friends of the minor, *C. Nangle*, had from time to time defaced the boundaries of the lands of *Mayne* and *Coole*, and had gradually encroached upon the lands of *Coole*, wherein they had only a determinable term, and added to the lands of *Mayne*, "wherein, as is alleged, they had a perpetual interest," several acres of the lands of *Coole*; and stating that the guardian and friends of the said minor, having despaired of obtaining a renewal of the lease of *Coole*, did, contrary to the consent of the plaintiff, cause a new ditch to be made, whereby about 28 acres were taken from *Coole* and added to *Mayne*, and that the lands of *Mayne* contained 15 A. 3 R. and 33 P. more than the number of acres demised by the original lease made to *B. Cooper*. The bill prayed that the plaintiff might be restored to and quieted in the part of *Coole* so taken from it and added to *Mayne*, and that the ancient and real boundary between *Coole* and *Mayne* might be set out and ascertained.

Christopher Nangle, by his guardian, put in his

answer to that bill, resisting the relief prayed, except so far as it sought a partition, to which he acceded. But no decree was pronounced, nor were any further proceedings had in that suit, the parties agreeing to come to a partition of the lands of *Mayne* and *Coole*. Surveyors were accordingly nominated, who ascertained the meres and bounds, and a new line of meering was, with the consent of both parties, made through the upland of *Mayne* and *Coole*, and through the bog of each, and proper maps were made of such partition.

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On the death of *T. Smyth*, the 3d, the lessor's interest in the lands of *Mayne*, subject to the lease of 1672, became vested in *Thomas Hutchinson Smyth*. In or before 1806, *William Henry*, Duke of *Gloucester*, one of the lives named in the renewal of *December* 1768, died. By indenture of renewal, dated the 16th of *February* 1806, and made between the said *T. H. Smyth*, of the one part, and *C. Nangle*, of the other part, it was witnessed that, "in pursuance of the said covenant for perpetual renewal, and in order to fill up the three lives agreeably thereto, and in consideration of the renewal fine of 14*l.* 7*s.* 8½*d.*," the said *T. Smyth* added to the time of the said demise the life of the Respondent, *John Hyacinth Nangle*, therein called *John Nangle*; and accordingly the said *T. H. Smyth* granted, &c. unto the said *C. Nangle*, and to his heirs and assigns, the said lands of *Mayne*, with the appurtenances; to hold the same unto him, his heirs and assigns, for the lives of King *George* the 3d, *C. Nangle*, and *J. H. Nangle*, and the survivor of them, subject to the payment of the rent and renewal fines, and to the performance of the covenants and agreements by the said indenture particularly reserved.

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King *George* the 3d having died in 1820, by indenture of renewal, dated the 12th *August* in that year, and made between the said *T. H. Smyth* and *C. Nangle*, in consideration of the renewal fine of 14*l.* 7*s.* 8½*d.*, *T. H. Smyth* added to the term of the said demise the life of *William Nangle* (one of the Respondents), and accordingly granted, released and confirmed unto the said *C. Nangle*, and to his heirs and assigns, the said lands of *Mayne*; to hold the same unto him, his heirs and assigns, for the lives of the said *C. Nangle*, *J. H. Nangle*, and *W. Nangle*, and the survivor of them, subject, &c. (as in the last-mentioned renewal).

Thomas Hutchinson Smyth died in 1830, and the lessor's interest in the fee and inheritance of the lands of *Mayne*, subject to the lease of 1672, and to the said several renewals, became vested in the Appellant, *Thomas Smyth*, as tenant in tail. In *Michaelmas* term 1831, he suffered a common recovery of the said lands, and thereby acquired the fee simple; and by indenture of settlement, made upon his marriage in 1832, the lands of *Mayne* were limited to his own use for life, with remainder to the first and other sons of the marriage in tail male, whereby the Appellant *Thomas James Smyth* (who is the eldest son of the marriage) is entitled to the first estate of inheritance in the said lands.

In 1831, the Appellant, *Thomas Smyth*, alleging that a larger quantity of the lands of *Mayne* was in the possession of *Christopher Nangle* than he was entitled to hold under the description contained in the lease of 1672, caused a notice in writing to be served on him, requiring him to deliver up the quiet and peaceable possession of all parts of the town and lands of *Mayne* and Upper and Lower *Coole*, then in

his possession, together with the moors and bogs and appurtenances thereunto belonging, “ save and except such parts of the lands of *Mayne* as are contained in a certain indenture of renewal, bearing date the 8th of *April* 1719, and which indenture purports to be made in pursuance of the decree of his Majesty’s Court of Chancery in *Ireland*, pronounced in 1716, &c. (before mentioned), and to be a renewal of a certain indenture of lease, bearing date the 24th day of *May* 1672, so far as that part of the said lands of *Mayne* contained 148 acres of profitable land, plantation measure, and 23 acres 12 perches of unprofitable land ;” and “ to take notice, that should you decline, &c. to deliver up to me the possession of the said lands, and to pay such mesne profits, &c., I will, from time to time, and for ever hereafter, decline and refuse to execute to you any renewal or under-lease of any part of the said lands and premises to which you may claim to be entitled under and by virtue of the said original lease, or any renewal thereof, or the said decree, or otherwise howsoever.”

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Christopher Nangle died in *June* 1836, having by his will devised estates, including the said lands of *Mayne*, unto the Respondents *Richard More O’Farrell* and *Gerald Dease*, to the use of the Respondent *J. H. Nangle*, for his life, with remainder to his first and other sons in tail, with remainder to the Respondent *William Nangle*, the second son of the said testator in tail, with remainders over.

Christopher Nangle having been one of the lives named in the seventh renewal of the lease of 1672, *J. H. Nangle*, becoming, upon his death, entitled to an estate for life in the lands of *Mayne*, claimed to have a new life added in his father’s place, upon payment of a renewal fine of 14*l.* 7*s.* 8½*d.*; and accord-

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ingly Mr. *Palles*, his solicitor, wrote a letter to *the* Appellant, *T. Smyth*, the 8th of *July* 1836, apprising him of the death of *Christopher Nangle*, and of the right of *J. H. Nangle* to have a renewal executed to him, upon payment of the rent and renewal fine then due. The Appellant's solicitor, in answer, served a notice on Mr. *Palles*, in the Appellant's name, "That upon *J. H. Nangle's* surrendering to the Appellant such parts of the lands of *Mayne*, and Upper and Lower *Coole*, with the bogs and moors adjoining thereto, except such part of the lands of *Mayne* as were contained in the lease of the 8th *April* 1719, and upon his paying all mesne rates and annual profits of the said lands, save as aforesaid, he, the said Appellant, was ready to execute such renewal of the lease of the 8th *April* 1719 as the representatives of *Garrett Nangle* might be entitled to claim from him ;" and the notice required the Respondent, *J. H. Nangle*, to state precisely under what title he claimed any part of the said lands, save 148 acres of profitable land, and 23 A. 0 R. 20 P. of unprofitable land.

A negotiation was carried on by the solicitors of the parties for some time, without any result ; but up to this period no objection was made by the Appellant or his solicitor to execute a renewal of the lease of 1672 on the ground of its not containing a covenant for perpetual renewal ; their only objection being that the Respondent, *J. H. Nangle*, was in possession of a larger quantity of the lands and bog of *Mayne* than had been devised by that lease, although the boundaries had been ascertained and settled in 1782, as before mentioned.

In *November* 1836, the Respondents filed their bill in the Court of Chancery in *Ireland*, against the Appellant, and, as afterwards amended, against his eldest

son, *Thomas James Smyth*, a minor, thereby stating most of the several matters hereinbefore mentioned, and that, "in the said indenture of lease (of 1672) was contained a covenant on the part of *H. Pakenham*, for the perpetual renewal of the said lease, on the fall of any of the lives therein, or in any of the renewals thereof to be, mentioned, on payment of a fine of half-a-year's rent to the lessor, &c. as by the said original lease, which had been destroyed, had the plaintiffs the same to produce, would appear, and as appeared by a recital thereof in the indenture of *December 1768*. The bill prayed (among other things) that the covenant for renewal, contained in the original lease, might be decreed to have been a covenant for perpetual renewal; that the plaintiffs, or such of them as should appear entitled thereto, might be decreed to have the said original lease for lives renewed to them and for their benefit, on paying to the person who should appear to be entitled to the reversion of the said demised premises the rent and renewal fine payable thereout pursuant to the covenant in the said original lease contained; and that the said defendant might be directed to execute such renewal to the plaintiffs forthwith, on payment of the said rent and renewal fine, &c.

The Appellant, *T. Smyth*, by his answer, denied that he had in his possession the original lease of 1672, and insisted that it did not contain any other covenant or agreement relating to the renewal thereof, than the memorandum hereinbefore mentioned, and which he admitted to have been indorsed thereon, and that such memorandum did not amount to a covenant for renewal; and he relied upon the proceedings and decree in the suit of 1713, as evidence that the lease of 1672 contained no other agreement relating to a

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renewal; and that the Lord Chancellor, who pronounced that decree, conceived that the lease was renewable for ever; and the Appellant further insisted, that all the persons who executed the seven renewals hereinbefore mentioned, were, respectively, strict tenants for life of the lands of *Mayne*, at the time of the execution of such renewals, which they executed in ignorance of their rights; and he claimed the said lands by title paramount to the titles of all those persons and to the title of *T. Smyth*, the 2d, the defendant in the suit of 1713; and consequently insisted that he was not bound by such renewals, and that they were fraudulent and void, as against him; and he altogether denied the Respondents' right to a renewal.

In *Easter* term 1837, the Appellant, *T. Smyth*, brought an ejectment in his own name and in the name of his son, the other Appellant, a minor, and others, for the purpose of recovering possession of the lands of *Mayne*; and in case it should be held that they were not entitled to recover the entire of said lands then they sought to recover the residue in the Respondents' possession beyond the precise admeasurements demised by the lease of 1672. A verdict was found in that action for the Respondents. The Appellant took exceptions to the charge of the learned Judge who tried the case; and the Court of Queen's Bench awarded a *venire de novo*, but declared, at the same time, that the indorsement on the lease of 1672, which was recited in the renewal lease of *December* 1768 did not amount to a covenant for renewal (a).

The proceedings in that action were put in issue in the Chancery cause, by a supplemental bill, filed in *October* 1837, the prayer of which was, that the plain-

(a) *Bell* dem. *Smyth v. Nangle*, 1 *Jebb & S.* 199.

tiffs might have the same relief in the premises as was prayed by their original bill. The Appellant, *T. Smyth*, in his answer to the supplemental bill, relied on the same grounds of defence as were insisted on by his answer to the original bill; and the Appellant, his son, joining in that answer, stated that he was a minor, and submitted his rights to the protection of the Court.

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The cause came to be heard before the Lord Chancellor of *Ireland*, in *November* 1838.

The Respondents, by their evidence, proved the loss of the tenant's parts of the original lease of 1672, and of the renewals of 1719, 1752, 1754, and of the 2d of *April* 1768. They proved the memorials of those renewals, and also produced and proved the renewals of the 25th of *December* 1768, of *February* 1806, and of *August* 1820; and they produced the bill filed by *Garrett Nangle*, in 1713, the depositions of witnesses, the notes of the hearing and the decree therein, and the bill filed by *T. Smyth*, the 3d, in 1774.

The Lord Chancellor, by an order made on the 22d of *December* 1838, ordered that the Respondents' bill should be retained for six months, with liberty for the Respondent, *J. H. Nangle*, to commence a feigned action at law against the defendants in the suit, to which they should appear gratis, and plead the general issue, and admit all matters of form, so that a trial might be had of the two following issues: First, whether at or before the time of the execution of the lease dated the 24th of *May* 1672, it was agreed between *Henry Pakenham* (the lessor), and *Bartholomew Cooper* (the lessee), that the said *H. Pakenham* should grant to the said *B. Cooper*, his heirs and assigns, a lease for lives renewable for ever, of the lands and premises in the said lease mentioned. Secondly,

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whether, independent of the memorandum or indorsement on the said lease, whereby it was agreed by and between the parties thereto, "that on the renewing or inserting of any life or lives, there should be paid by the lessee, his heirs or assigns, the sum of 16*l.* 16*s.* 4*d.*," there was contained in the said lease any clause, covenant, or agreement, relating to the renewal of the said lease to the said lessee, his heirs and assigns. And the parties to the said action were to be respectively at liberty to give in evidence, on the trial of such issues, all the evidence used by the said parties on the hearing of this cause (*b*).

The Appellants, in their petition of appeal against that order, prayed that the same might be reversed, and that the original, amended, and supplemental bills, might be dismissed with costs.

Sir *William Follett* and Mr. *Jacob*, for the Appellants (*c*):—It is not alleged by the Respondents' original or amended or supplemental bill, that there was any agreement between the lessor and the lessee, in the lease of 1672, that the lessor should grant to the lessee, or his heirs and assigns, a lease for lives renewable for ever, of the lands therein mentioned. The only agreement set forth in the bill and in the renewals therein stated, is the agreement contained in the memorandum or indorsement. It is not alleged that, independent of that memorandum or indorsement, there was contained in the lease any clause, covenant, or agreement relating to the renewal of it to the lessee, his heirs or assigns. The Court below ought not, therefore, to have directed issues as to such matters, the Respondents having by their bill relied for relief

(*b*) 1 *Law Recorder* (3d Series), p. 119.

(*c*) Mr. *Hamilton Smyth*, of the *Irish Bar*, was with them.

exclusively on the construction to be given to the memorandum which the Appellants admitted to be on the lease of 1672. Even if the Respondents had by their bill relied on any such supposed agreement at or before the execution of the lease, or on any such supposed clause, covenant or agreement in the lease, yet, as *Garrett Nangle* had insisted on such supposed agreement by his bill in the *Irish* Court of Chancery in 1713, and examined witnesses and failed to prove any such agreement, and as he also, on the hearing of that cause, produced the lease itself, and had it read in Court, and thereby negatived the existence of any clause, covenant or agreement relating to the renewal of it, independent of the memorandum or indorsement, no inquiries ought now to be directed, after the lapse of more than a century, as to matters in favour of the Respondents, claiming under *Garrett Nangle*, who had failed to prove them when witnesses living at the time of the transaction might have been, and were examined.

The acts of the lessors in the several renewals granted by them since 1719 do not affect the Appellants. The parties granted those renewals not only in ignorance of their own powers to grant such leases at all, but also in ignorance of their right to refuse to renew, or of the rights of the lessees to claim renewals. At all events, the acts of parties cannot form any ingredient in the construction of this agreement. An agreement that a Court will construe to be a covenant for perpetual renewal, must be so clear that it will not bear any other construction; *Iggulden v. May*(*d*), *Harnett v. Fielding* (*e*), *Browne v. Tighe*(*f*). It is impossible to hold this memorandum to be a

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(*d*) 9 Ves. 325; 7 East, 237. (*f*) *Ante*, Vol. II. pp. 396–416.
(*e*) 2 Sch. & Lef. 549.

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covenant for perpetual renewal. The Lord Chancellor of *Ireland*, in the decree of 1716, declared it was not; and the Judges of the Queen's Bench declared the same upon deciding the exceptions to the Judge's direction at the trial of the ejectment (g).

By the general rules of the common law, if there be a contract which has been reduced into writing, evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify, the written contract. The first issue directed is at variance with such legal principle. The pleadings do not make such a case as warrants that issue; for the Respondents rely on the agreement contained in the memorandum, and they pray that agreement to be declared a covenant for perpetual renewal. It is impracticable to produce any parol evidence upon the subject-matters of either of the issues; and all the documentary evidence capable of being adduced having been before the Court below, that Court ought to have come to a decision upon the subject without involving the parties in the expense of the trial of issues at law; *Nicol v. Vaughan* (h), *Viscount Lorton v. Earl of Kingston* (i).

It would be extremely dangerous to submit these issues to a jury. According to the settled principles of a Court of Equity, it is only when the Court entertains a reasonable doubt as to the fact, and when it depends on evidence the effect of which can be better ascertained before a jury, that the Court for the information of its own conscience directs an issue as to such fact; *Short v. Lee* (k): whereas in this case, if a jury could be tempted

(g) 1 Jebb & S. 199

(h) 2 Dow & C 428; 1 C. & F. 495.

(i) *Ante*, Vol. V. p. 270.

(k) 2 Jac. & W. 496.

to find in the affirmative of the issues, in order to support a long possession, the conscience of the Court of Chancery could not act on a verdict so manifestly contrary to the truth of the case and the evidence in the cause.

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Mr. *Pemberton* and Mr. *Wakefield*, for the Respondents (1):—There was doubt enough to justify the Court to direct an issue to try whether the original lease contained a clause for perpetual renewal; or whether there was a previous agreement to that effect between the parties, and not inserted in the lease. It was to be collected from the proceedings and evidence in the cause of *Nangle v. Smyth*, in 1713–1716, that at or before the time of the execution of the lease dated the 24th *May* 1672, which was long before the passing of the Statute of Frauds and Perjuries in *Ireland*, it was agreed between *Packenham* (the lessor), and *Bartholomew Cooper* (the lessee), that *Packenham* should grant to *Cooper*, his heirs and assigns, a lease for lives renewable for ever, of the lands and premises in the lease mentioned; that was stated in the bill, and not denied in the answer. The first issue directed by the decree was a proper issue to be tried by a jury, to ascertain that point. It appeared from the evidence in that cause, and from the evidence in this cause, that there is reasonable ground to presume that, independent of the memorandum admitted to be on the lease of 1672,—whereby it was agreed between the parties thereto, “that on the renewing or inserting of any life or lives, there should be paid by the lessee, his heirs or assigns, the sum of 16*l.* 16*s.* 4*d.*,”—there was contained in that lease some clause, covenant or agree-

(1) Mr. *Hardey*, of the *Irish Bar*, was with them.

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ment, relating to the renewal of it to the said lessee, his heirs and assigns; and therefore the second issue directed by the decree was a proper issue.

The loss of the tenant's part of the original lease, and of the renewal under the decree of the Court of Chancery in 1719, was proved in the Court below, but the landlord's parts of those respective instruments were not produced by him, although he was called on by notice in the cause to produce them. The landlord's parts of the several subsequent renewals were produced by him, but no account or explanation was given of the non-production of the lease of 1672 and the renewal of 1719. Under these circumstances, the Court, if not justified in presuming, as the Respondents contended, that the original lease did contain a covenant for perpetual renewal, was, at all events, warranted in directing that fact to be submitted to a jury for investigation and inquiry. Assuming that the Court ought not to have decided in favour of the Respondents, as was contended on their part, upon the presumption of the contents of an instrument not produced, yet the question of the existence of a covenant for renewal was, as a matter of fact, a proper one to be submitted to a jury.

The principle on which the Courts of Equity direct issues is not as stated on the behalf of the Appellants. In *Norman v. Morrell* (*m*), an issue was directed as to the amount of a legacy; a doubt arising on a figure only. In *Burkett v. Randall* (*n*), the bill prayed a conveyance on the ground of an equitable title in a testator, originating in an agreement which the answer denied, but which was supported by evidence of ownership; an issue was directed to try whether the testator was beneficially entitled at his death. In the case of

(*m*) 4 Ves. 769.

(*n*) 3 Meriv. 466.

Collins v. Sawrey (o), this House held that the Court below did right in sending an issue to a jury, though the whole of the evidence was written evidence, and the question depended on the construction of that evidence. Under the circumstances of the present case, where there were seven successive renewals of the lease by successive owners of the estate, the Appellant himself being a witness to the last, the first renewal being under a decree, and all the renewals spreading over a period of 120 years, without resistance or question as to the right, there were proper grounds for the issues.

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[The *Lord Chancellor* intimated an opinion that all the House could do would be to dismiss the bill without prejudice to the plaintiff's filing another bill. The issues were not consistent with the case made by the present bill.]

Sir *William Follett*, in reply:—It is quite useless to allow further proceedings; the only effect of which must be to put the parties to expense by litigation. It is impossible to infer from the renewals that there was a covenant for perpetual renewal in the original lease: no jury could infer it; no Judge could put it to them to draw such an inference. All the renewals repeat this covenant, such as it is. The Judges of the Queen's Bench, deciding on the exceptions, held that it was not a covenant for perpetual renewal. The statements and admissions contained in the bill as charged to have been made by the tenants for life, are not evidence against the Appellant. It is admitted on all sides, that the issues cannot stand as directed. Any finding by a jury on them could not

(o) 4 Bro. P. C. 692.

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assist the Court in coming to a decree on the cause. The facts cannot be altered; no additional evidence can now be procured by the Respondents. Every material fact is before the House, and the case is ripe for judgment. The whole question is, was there or not a covenant for perpetual renewal in the lease of 1672? If there was not, the bill must be dismissed with costs.

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The *Lord Chancellor* :—This suit was instituted to obtain the benefit of a perpetual renewal of a lease, which had been agreed for, as alleged, in 1672; and since the case was argued yesterday, I have taken advantage of the interval to look through the pleadings, and I think our judgment must be regulated by the pleadings and by them alone; because it would be very dangerous to listen to certain arguments urged at the bar, that a different rule of pleading is to be followed regarding matters of equity when the cause comes from the Courts in *Ireland*, from the rule that is followed when the cause comes before your Lordships from the Courts in *England* (*p*). An adherence to the rules of pleading for this purpose is essential to the administration of justice, in order to give to each party the opportunity of knowing the case which he has to meet. When this case comes to be investigated, there is no such objection to the pleading as was urged; and when I threw out that the House might be disposed to dismiss the bill without prejudice to the party's filing another bill, it was certainly on the supposition that the form of the bill might have been more advantageously framed, if it had assumed a different shape; but when I come to consider what

(*p*) The part of the argument to which his Lordship refers is left out of the report, as the decision of the House was in no degree founded upon it.

appears on the proceedings of 1713, I am quite satisfied that the gentleman who drew this bill, having those proceedings before him, could not have drawn it in a way which would have led to a more beneficial result to his client than the course he has adopted.

The order of the Lord Chancellor of *Ireland* directed certain issues to be tried, and the question is, whether those issues are at all consistent with the case made by the bill: one of the issues being to inquire whether there was an agreement, independently of the lease, at or before the period of the lease of 1672; and the other, whether that lease contained any other provision besides that memorandum which the plaintiff states to have been either included in or attached to that lease. When we look to the bill itself, it does not open the door to any one or other of these inquiries. It confines the plaintiff's case strictly to what the plaintiff alleges to have been contained in that lease of 1672. The bill states that lease, and then states that it contained a covenant for perpetual renewal, and refers to a subsequent lease of the 25th of *December* 1768, as evidence of the alleged contents of that first lease. Now if the bill had stopped there, if there was nothing further, no further allegation on the subject, it might have been open to the observation of Mr. *Wakefield* that it was an allegation that the original lease contained a covenant for renewal, and referred to the renewed lease of 1768 as evidence of its containing such a covenant. But the subsequent part of the bill entirely excludes such a supposition; for in mentioning the renewal, it always mentions it to be "in pursuance of said covenant." It states, "your suppliants do not possess any copies or copy thereof, or of any of them, or any evidence of the contents thereof, save the recitals thereof contained

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in the said indenture of the 25th day of *December* 1768, hereinafter mentioned; but which recitals your suppliants submit are conclusive evidence of the contents thereof, for the reasons hereinafter set forth." Then in a subsequent part, the bill states that "the last-mentioned indenture of renewal contains full recitals of the several indentures hereinbefore set forth or mentioned, and hereinbefore stated to have been burned or destroyed," which includes the lease of 1672, "and having been executed by *Thomas Smyth*, the 8d, who was seised of the inheritance, &c. and under whom *Thomas Smyth*, the defendant, claims title, your suppliants submit that *Thomas Smyth* (the defendant) is bound and estopped by the recitals contained in the last-mentioned indenture of renewal." Then the bill prays "that the covenant for renewal contained in the said original lease may be decreed to have been a covenant for perpetual renewal."

It is impossible to read that bill and put any other construction on it than this, that that which appears in the renewed lease of *December* 1768, is a copy of that which is contained in the lease of 1672. We have not got the deed of 1672; it was burned or destroyed; but we state that we know what it contains, because the deed of *December* 1768 contains all the recitals and statements in that deed: and then, having got that covenant from the deed of 1768, the bill prays that the covenant contained in the original lease, alleged to be identical with that which is stated in the renewed lease of 1768, may be declared to be a covenant for perpetual renewal. The whole case of the plaintiff is put on the construction of that covenant, which is stated by the plaintiff to be identified and ascertained by the renewed lease of 1768. Well, that case fails: it is not attempted at the bar to be

argued that that covenant is a covenant for perpetual renewal, or that it gives the plaintiff any title to the relief which he claims by this bill. The issues tendered by the bill are as to the construction of the covenant. But what have the issues directed by the Court to do with the construction of the covenant? They have nothing to do with the construction of the covenant; they find out a case for the plaintiff *dehors* the bill.

Then it occurred to me, certainly, that if the bill had assumed a different shape, and had stated that the deed was lost, but through the dealings between the parties an inference ought to be drawn that that deed contained a covenant for perpetual renewal, and brought forward evidence for the affirmative of that proposition; that a large and reasonable inquiry might have been open to the plaintiff, which might have justified the inquiries directed by those issues. But when we look at the earlier history of this transaction, and at what passed in the year 1713, when the original lease existed, when the parties had it to produce, when they were as much interested in making the most of that lease as at the present moment, it is quite clear there is no room for any presumption that the deed itself, then in possession of the parties, did contain any other covenant but that which is contained in the renewed lease of 1768. The complaint is not of any covenant that is contained in the original lease, but the bill prays for relief on the ground of some mistake or error made by the person employed to prepare that lease, and asks for relief on the ground of that supposed error. Why, there was no error in the covenant for renewal, which is all the plaintiff asks for: instead of that, he states that which appears in the renewed lease of 1768, and asks for relief on

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the ground of that not being properly adapted to the purpose the parties had in view. That shows that no further investigation, nor any other form of suit, could possibly enable the plaintiff to obtain that relief which he asks; and the person who prepared this bill had good reason for not opening a door for further inquiry, knowing that the proceedings of 1713 would show that there was no other ground on which the plaintiff's case could by possibility succeed.

No doubt, after possession has been held for so long a time, and parties have supposed they have a title which they have not, Courts of Justice are anxious to take care that no conclusion may be drawn inconsistently with the original right of the parties; and where the dealing presupposes that there are grounds of title which are not then capable of being proved, they would give the party every opportunity of proving the history of that title. Such, however, is not the title now set up by the plaintiff; and I think it would be improperly encouraging litigation to allow the plaintiff to file a bill, which he will not be able to sustain. If he has any other ground of equity, or a case generally which enables him to make a new title to new relief, under those circumstances the dismissal of this bill will not prejudice him. I think it much fairer, considering the circumstances of the transaction, not to hold out any hope to the plaintiff of proceeding in a case which, according to the rules of practice, he would be precluded from proceeding with by the dismissal of his bill. I therefore propose to your Lordships that this decree should be reversed, and the bill dismissed, with costs.

Lord Brougham :—I agree with what my noble and learned friend has stated in the opinion he has given

as the result of this case, in every particular. It has been said that certain inattention, or negligence, or slovenliness, as was stated in one part of the observations at the Bar, has been found to prevail in other parts of the United Kingdom in the drawing of pleadings, and that on that account your Lordships ought to apply a rule to cases coming from that part of the kingdom different from the rule you apply to cases coming from nearer home. I should say, if there were such negligence or slovenliness (which I very much doubt), that would be an exceedingly dangerous course for your Lordships to take ; for it would be the means of perpetuating that negligence, or at least slovenliness, which, it is suggested, there exists. I do not believe it exists ; but if it does exist, your Lordships, by having one rule of pleading for *Ireland* and another for *Westminster Hall*, would undoubtedly perpetuate it. But I see no evidence whatever of this negligence in the present case. I see nothing whatever of that defect in the present pleadings. The defect is not in the draftsman, but in the party ; not in the bill, but in the case. The bill appears to me to meet the facts of the case, and no doubt it is unfortunate to the party that it must be so framed ; but the case being defective in that essential particular which has been pointed out by my noble and learned friend, the bill is defective in that particular, as the case, as the facts upon which the draftsman had to proceed were defective ; and therefore cannot be now remedied.

My Lords, a doubt appeared to exist at one moment in my noble and learned friend's mind, as in my own, whether we ought not to dismiss this bill without prejudice, so as to enable the party to file another ; but I think the real answer to that is, that looking at the proceedings of 1713, that the lease was in existence

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and was before the draftsman who prepared that bill which was disposed of by Lord *Middleton*, there is no evidence here, from the frame of that bill, of what the contents of the lease then before the draftsman were. I do not say whether that bill would be evidence between the parties in the present suit, supposing an action was sent to be tried at law. I do not argue that at all; but in the discretion which this Court has to exercise, as to whether it will encourage another suit or not, it is very material to consider whether there is any possibility, when you look at the bill, of the lease being now produced and found to contain the clause it is alleged to have contained, namely, the covenant for perpetual renewal. Is it possible to conceive that there should be a lease in existence with that covenant, when you see the way in which that bill of 1713 is framed, with the lease lying before the draftsman at the time? So far from saying there is a covenant for perpetual renewal in that bill, he says there were various covenants in the bill; that it was agreed between the parties at and before the time of executing that lease, it was understood and agreed between them, that there should be a perpetual renewal, as more plainly appears by this clause, namely, the 16*l.* 16*s.* 4*d.* clause. Now, if there had been a covenant for perpetual renewal, it would not have more plainly appeared by that clause, but it would most plainly have appeared by the covenant of renewal itself. It is clear that there was no such covenant, or the draftsman would not have had recourse to that form of stating his case, or to that kind of evidence by which he was to support it. Then he states the reason why that sixteen-guinea clause was so framed, and was not a covenant for a perpetual renewal; namely, the unskilfulness of the conveyancer who prepared the

lease. It is clear, in my opinion, that your Lordships have the strongest reason to suppose, the strongest reason that can be imagined, that in the lease itself, if it had not been unfortunately destroyed, there would have been found no covenant for a perpetual renewal, excepting that clause respecting the sixteen guineas, the amount of the fine.

I entirely agree with my noble and learned friend that this decree ought to be reversed, and the original bill dismissed, with costs below.

It was ordered accordingly that the order complained of by the appeal be reversed, and that the Respondents' bill be dismissed out of the Court below, with costs; and that the cause be remitted, &c.

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THE RIGHT HON. MASON GERARD,
EARL of ALDBOROUGH - - - } *Appellant.*

HENRY NORWOOD TRYE and Others - *Respondents.*

*Expectant
Heir.
Post-obit
Securities.
Rule of Value.
Voluntary
Deed.
Practice.*

A., being tenant in tail of large estates expectant on the death of his father, in consideration of 6,000*l.* and 10,000*l.* advanced to him by *O.*, charged the estates with 12,000*l.* and 20,000*l.* to be paid only in the event of surviving his father, who was about 80 years of age, *A.* being about 43; and he granted to *R.*, his agent in these transactions, in consideration of his services, an annuity charged on the same estates. *R.* assigned the annuity to *O.* for valuable consideration. *O.* filed a bill against *A.*, after his father's death, to enforce these securities; and *A.* filed a cross bill to set them aside, charging that *O.* and *R.* took advantage of his distress, and that no adequate consideration was given him for the *post-obit* securities, and no consideration for the annuity: and at the hearing he gave evidence that the consideration for the two sums of 12,000*l.* and 20,000*l.* was not the full value according to the tables and calculations of actuaries. *O.* gave no evidence of value.—HELD, that the Court, in the absence of evidence to enable it to decide the question, exercised a proper discretion in directing the Master to inquire what, at the time of the transaction, was the fair market price of the two sums so secured to be paid, regard being had to the ages of *A.* and of his father, and to the circumstances of the estates and *A.*'s interest in them.—(*Infra*, p. 456.)

A person seeking the benefit of a dealing with an heir expectant for his expectancies, must show that he gave him an adequate consideration, which is the fair market price at the time of dealing, and not the value according to the calculations of actuaries on the tables.—(*Gowland v. De Faria* explained; *Infra*, p. 457–461.)

The rule that a fair price is to be given, is sufficient protection to heirs expectant or reversioners; but the rule of full value would not be any protection, as in that case they could not deal with their expectancies or sell their interest at all.—(*Infra*, p. 457, 465.)

A sale by public auction is within the proper rule, on the plain principle that the sum which the thing will fetch is the sum which it is worth.—(*Infra*, p. 460.)

A party comes too late to complain of a decree after joining in the inquiry directed by it, and the result is against him; and he is not entitled to question the Master's report after it is confirmed, having taken no exceptions.—(*Infra*, p. 455–6.)

If a person grants a voluntary deed, enabling the grantee to raise money on it from a third person, the grantor cannot get back or set aside the deed without paying what was advanced on it without fraud.—(*Infra*, p. 463.)

THE Appellant is the only son of *Benjamin*, late Earl of *Aldborough*, who was one of the younger sons of

John, formerly Earl of *Aldborough*, and succeeded to the Earldom in 1823, in consequence of the death of his elder brothers without leaving male issue. Earl *John*, the Appellant's grandfather, died in 1802, having by his will, dated the 13th of *December* 1772, devised various towns and lands of great extent and value, in the counties of *Limerick*, *Tipperary*, *Dublin*, *Wexford*, *Wicklow*, and *Kildare*, to certain uses, under which, in the events which happened previously to the year 1824, *Benjamin*, Earl of *Aldborough*, was in that year tenant for life of all those estates, with remainder to the Appellant in tail male.

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Mason Gerard, esq., uncle of the Appellant's mother, died in 1784, having by his will, dated the 11th of *March* 1782, given and devised all his real and personal estates, of what nature and kind soever, in trust (after payment of his debts and legacies, which have been long since paid) to apply one moiety of the net produce thereof to his sister, *Sarah Burton*, for her life, and after her decease, to the use of the said *Benjamin Stratford*, afterwards Earl of *Aldborough*, for his life; and as to the other moiety thereof, to the use of the said *Benjamin* for his life; and as to the whole of such real and personal estates, after the death of *Benjamin*, to the use of his first and other sons by *Martha* his wife, severally and successively, in tail male. *Martha*, Countess of *Aldborough*, was the Appellant's mother: she was daughter of *Sarah Burton*, who died before the year 1824.

In the year 1825, when the transactions with Mr. *John Harvey Ollney* (after mentioned), which form the subject of this appeal, commenced, *Benjamin*, Earl of *Aldborough*, was seventy-nine years of age;

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the Appellant, then Viscount *Amiens*, was about forty-two. The properties in which he was then interested in remainder were subject to some incumbrances, but they produced to his father a clear rental of 8,000*l.* a year. He had an allowance from his father of only 500*l.* a year; and having no other income for the support of himself and family, he was under great pressure and difficulties, and confined within the rules of the King's Bench prison for debt.

In those circumstances the Appellant entered into a treaty with Mr. *Ollney* for raising a sum of 6,000 *l.*; and for the immediate advance of that sum, he agreed to give a security on the estates comprised in the wills before recited, and his own personal security, for 12,000 *l.*, payable after his father's death, in the event of his surviving his father. Accordingly, by an indenture dated the 21st of *December* 1825, and made between the Appellant, by his description of Viscount *Amiens*, of the one part, and *John Harvey Ollney*, of the other part, the Appellant, in consideration of 6,000 *l.*, covenanted that in case he should be living at the time of the decease of *Benjamin*, Earl of *Aldborough*, his father, he, the Appellant, his heirs, executors or administrators, would, within three months next after the decease of the said Earl, pay *Ollney*, his executors or administrators, the sum of 12,000 *l.* of lawful money of *Great Britain*. And by this indenture the Appellant demised unto *J. H. Ollney*, all those several towns, lands and hereditaments, situate in the several counties before mentioned in *Ireland*, and all other lands, tenements and hereditaments comprised in and devised by the said wills of *John*, Earl of *Aldborough*, and *Mason Gerard*; and all other

lands, tenements and hereditaments whatsoever, in *Ireland*, of or to which the Appellant was seised or entitled at law or in equity, or otherwise howsoever, in possession, reversion, or remainder; to hold unto *J. H. Ollney*, his executors, administrators and assigns, for the term of 99 years without impeachment of waste, in trust for *Benjamin*, Earl of *Aldborough*, during so much of that term as he should live; and after his decease, in trust for the person or persons for the time being entitled to the said towns, lands, tenements and hereditaments, in remainder expectant on the determination of that term, in case the Appellant should depart this life in the lifetime of the said Earl, or if the Appellant should survive him, then until default should be made in payment of the sum of 12,000 *l.*; and in case of such default, then that *Ollney*, his executors, administrators or assigns, should, at any time thereafter, and without the necessity of any further authority or concurrence of the Appellant, by sale or mortgage levy and raise the sum of 12,000 *l.*, or so much thereof as should remain unpaid, with interest, to be computed from the end of three months next after the decease of the said Earl, together with all incidental costs and charges.

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The indenture contained a covenant by the Appellant to levy fines; and also, in case he should survive the Earl his father, to suffer common recoveries of the said lands and hereditaments; and it was thereby agreed and declared, that the fines and recoveries should operate and enure to the use of *J. H. Ollney*, his executors, administrators and assigns, for the said term, upon the trusts before expressed.

Fines were accordingly levied of the said lands by the Appellant, in the Court of Common Pleas in

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Ireland; and the payment contingently, as before stated, of the said sum of 12,000*l.*, was further secured by the Appellant's bond, executed by him as part of the same transaction.

The Appellant having received the above 6,000*l.*—with considerable deductions under the designation of costs, premium and commission—was soon afterwards released from confinement. Being again pressed by difficulties, and in urgent distress, he was obliged again to raise money; and accordingly, through the agency of Mr. *Lucius Hooke Robinson*, by whose agency he had raised the 6,000*l.*, it was arranged that the Appellant, in consideration of 10,000*l.*, should grant another *post-obit* security to *J. H. Ollney* for 20,000*l.*, to be paid on the like events. Accordingly by another indenture, dated the 27th of *July* 1827, the Appellant, in consideration of the sum of 10,000*l.* therein alleged to be paid to him by *Ollney*, covenanted, that in case he should be living at the time of the decease of the said Earl his father, he, the Appellant, his heirs, executors or administrators, would, within three months next after such decease, pay unto *Ollney*, his executors or administrators, the sum of 20,000*l.* of lawful money of *Great Britain*. And it was thereby agreed and declared, that the powers given to him and them over the said lands and hereditaments by the before-stated indenture of the 21st *December* 1825, might be exercised for securing the payment of the 20,000*l.* with interest from the time the same should become payable, as well as the payment of the said 12,000*l.* and interest. The payment contingently, as aforesaid, of the sum of 20,000*l.* was further secured by the Appellant's bond executed at the same time.

As part of the same transaction, the Appellant also executed an indenture, dated the 28th of *July* 1827, expressed to be made between him and *Lucius Hooke Robinson*, of *Charlotte-street, Bloomsbury*, in the county of *Middlesex*, gentleman, whereby the Appellant, in consideration of services done for him by *Robinson*, granted unto him, his executors, administrators and assigns, an annuity of 200*l.* charged upon the said lands and hereditaments, for the term of 99 years, to commence from the death of *Benjamin*, Earl of *Aldborough*, if the Appellant should be then living, and fully to be completed and ended if *Robinson* should so long live, and to be paid by equal quarterly payments; the first payment to be made at the expiration of three calendar months after the decease of the said Earl, if the Appellant should survive him. And by the same indenture the Appellant demised unto *Robinson* all those lands in the several counties before-mentioned in *Ireland*, and all other the lands comprised in and devised by the wills of *John*, Earl of *Aldborough*, and *Mason Gerard*; and all and singular other the towns, lands and hereditaments whatsoever in *Ireland*, of or to which the Appellant was then seised or entitled in possession, reversion or remainder; to hold unto *Robinson*, his executors, administrators and assigns, for the term of 100 years, without impeachment of waste, upon certain trusts, for securing the said annuity. And by another indenture of the same date, *Robinson* was appointed receiver over all the estates after the death of the Appellant's father.

By indentures of lease and release, dated the 2d and 3d of *July* 1828, the release being of seven parts, and expressed to be made between *Benjamin*, Earl of *Aldborough*, of the first part; the Appellant, of the

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second part; *James Montgomery Blair*, *Robert Saunders*, the Rev. *John Christopher Lloyd*, and others, of the third, fourth, fifth, sixth, and seventh parts; and by common recoveries suffered in the Court of Common Pleas in *Ireland*, in pursuance of an agreement contained in the indenture of release, the lands and hereditaments devised by the wills of *John*, Earl of *Aldborough*, and *Mason Gerard*, were discharged from the estate tail of the Appellant therein, and all remainders thereupon expectant, and were limited and assured by the Appellant and his father to the use that the said *J. M. Blair*, his executors and administrators, might, during the joint lives of *Benjamin*, Earl of *Aldborough*, and of the Appellant, receive, upon certain trusts in that indenture contained, a yearly rentcharge of 700 *l.* out of the said lands and hereditaments; and subject thereto, to the use that, after the decease of the said *Benjamin*, Earl of *Aldborough*, the said *R. Saunders* and *J. C. Lloyd* should receive upon the trusts therein mentioned a yearly rentcharge of 700 *l.* out of the said lands and hereditaments; and subject to this last-mentioned yearly rentcharge, to such uses as *Benjamin*, Earl of *Aldborough*, and the Appellant, should by deed jointly appoint; and in default of and until such appointment, to the use of the said *Benjamin*, Earl of *Aldborough*, and his assigns, for his life, without impeachment of waste, and after his decease to the use of the Appellant, his heirs and assigns for ever.

In the year 1833 the Appellant applied to Mr. *Ollney* for a further sum, which the latter agreed to advance upon further security; and accordingly by indentures of lease and release, dated the 1st and 2d of *March* 1833, the release expressed to be made between the Appellant of the first part, *J. H. Ollney* of the second part, and *Margaret Powell* and *William Charles King*.

of the third part, the Appellant covenanted with *Ollney*, that, in consideration of 5,000*l.* alleged to be paid to him by *Ollney*, he would, on the 2d of *August* then next, pay unto *Ollney*, his executors, administrators or assigns, the sum of 5,000*l.*, with interest for the same after the rate of 6*l. per cent. per annum*; and the Appellant conveyed unto the said *Margaret Powell* and *W. C. King*, and their heirs, all those the lands and hereditaments in the said several counties of *Ireland*, and all other the lands and hereditaments devised by the wills of *John*, Earl of *Aldborough*, and *Mason Gerard*; and all other lands and hereditaments in *Ireland* of or to which the Appellant was then seised or entitled in possession, reversion or remainder; to hold to the use of *Margaret Powell* and *W. C. King*, their heirs and assigns for ever, subject to the life estate of *Benjamin*, Earl of *Aldborough*, and to the said indentures of the 21st of *December* 1825 and 27th of *July* 1827, and the said annuity of 700*l.* limited to *R. Saunders* and *C. Lloyd*; nevertheless, in case the said sums of 12,000*l.* and 20,000*l.*, secured by the said indentures, should either never become payable, or should, together with all interest, have been fully paid at the expiration of six calendar months next after the decease of *Benjamin*, Earl of *Aldborough*, and in case the said 5,000*l.*, and all interest thereon, should have been fully paid within six calendar months after the decease of the said Earl, then in trust for the Appellant in fee; and in case such several sums, or any part thereof, or any interest thereon, should be unpaid at the end of six calendar months next after the decease of the said Earl, then upon trust to sell and dispose of the said lands and hereditaments, or any part thereof; and out

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of the monies to arise from such sale or sales, and out of the rents and profits which should arise from and after the death of the said Earl, in the first place to pay all expenses of sale; and in the next place to pay unto *J. H. Ollney*, his executors, administrators or assigns, all such principal monies and interest as aforesaid, and the ultimate surplus, which should remain, unto the Appellant, his executors, administrators or assigns.

By an indenture dated the 4th of *March* 1833, made between the said *L. H. Robinson* and *J. H. Ollney*, *Robinson*, in consideration of 750*l.*, assigned to *Ollney*, his executors, administrators and assigns, the annuity of 200*l.* granted by the deed of 28th of *July* 1827, and the lands and hereditaments thereby demised to *Robinson* as aforesaid.

Benjamin, Earl of *Aldborough*, died in *July* 1833, leaving the Appellant (who succeeded to the Earldom) surviving; whereupon Mr. *Ollney* became entitled to the several sums secured by the said recited indenture.

In *Michaelmas* term 1833, *J. H. Ollney* filed his bill in the Court of Chancery in *Ireland* against the Appellant and others, thereby stating the said securities executed to him by the Appellant, and the said deeds whereby the annuity of 200*l.* was granted to *Robinson* and assigned to *Ollney*; and the bill prayed that an account might be taken of what was due to *Ollney* for principal and interest in respect of the said three several sums of 12,000*l.*, 20,000*l.*, and 5,000*l.*, and in respect of the said annuity; and also of all incumbrances affecting the said lands and premises prior to his demands; and that, in default of payment of the sums which should be found due on such account, the Appellant might be barred and for ever foreclosed of

and from all benefit and equity of redemption, of and in the towns, lands, tenements and hereditaments respectively charged with the said principal sums and interest, and that the same might be sold by and under the direction of the Court for the residue of such terms, or such other period as the Court should think proper; and that out of the proceeds of such sales the sum which should be found due to *J. H. Ollney*, upon taking the accounts, and such charges (if any) as the Court should consider to be properly payable thereout, might be paid and satisfied, and that the residue of such proceeds, or a competent part thereof, might be properly secured for the purpose of answering the accruing payments of the annuity of 200*l.*; and that in the meantime a receiver might be appointed of the rents, and be directed to apply the same towards satisfaction of the sums due and to become due to *Ollney*.

In *March* 1835, the Appellant put in his answer, whereby he admitted the material facts stated in the bill, but alleged that in the years 1810, 1812, 1814, and 1816, he charged the said lands and hereditaments with annuities amounting to upwards of 1,324*l.*, payable during the lives of himself and of other persons, in the event of his surviving his father, and with divers principal sums of money amounting to upwards of 40,000 *l.*, payable in the like event; and he alleged that at the time when *J. H. Ollney* paid him the said sums of 6,000*l.* and 10,000*l.* he was in great pecuniary distress, and was thereby induced to submit to unreasonable terms; and that *L. H. Robinson* was employed by *Ollney*, and not by the Appellant, in negotiating the said transactions; and that the indenture of the 21st of *December* 1825 was prepared by Mr. *W. R. King*, the solicitor of *Ollney*, and was executed by the Appellant in prison, without consulting any

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solicitor ; and that the said indenture was not in conformity to the agreement between the parties, for that the Appellant had agreed to pay the sum of 12,000*l.* within twelve, and not within three months, after the death of his father, if he survived him ; and that the Appellant, on the execution of the said indenture, paid to *L. H. Robinson* 600*l.* as a *bonus*, with the knowledge of *Oilney* ; and that the indenture of the 27th of *July* 1827 was also prepared by *W. R. King*, and was executed by the Appellant while abroad, and without consulting any solicitor ; and that on the execution of the last-mentioned indenture, the Appellant paid to *Robinson* 1,000*l.* as a *bonus*, and also paid to *W. R. King* 500*l.* for his charges, exclusive of stamps and other costs out of pocket, and travelling expenses ; and that the indenture of the 28th day of *July* 1827 was prepared by *W. R. King*, with the privity of *Oilney* ; and that by another deed the Appellant appointed *L. H. Robinson* receiver of the rents of the said hereditaments, after the death of the Appellant's father ; and that in the year 1825 the Appellant's father was upwards of 83 years of age, and was in a very infirm state of health, and that the Appellant was then only 45 years of age, and a very healthy person ; and the Appellant, by his answer, insisted that, on payment of the said sums of 6,000*l.* and 10,000*l.*, with interest from the times of the said advances, the indentures of the 21st of *December* 1825, and the 27th of *July* 1827, ought to be set aside, and that the indenture of the 28th *July* 1827 ought to be set aside without payment by the Appellant of any sum whatsoever. And the Appellant alleged that, out of the said sum of 5,000*l.*, he paid *W. R. King* 300*l.* for expenses ; but he admitted that *Oilney* was entitled to the said sum of 5,000*l.*, secured by the indentures

of the 1st and 2d *March* 1833, with interest thereon from the time of the advance thereof; and the Appellant submitted that, at the time of the said several transactions with *J. H. Ollney*, the Appellant was in the situation of an expectant heir, dealing with his expectancies, and that advantage had been taken by *Ollney* and his agent of the situation of Appellant, and of his necessities and embarrassments, and that Appellant was entitled in equity to be relieved from the said bargains.

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The Appellant, on the 19th of *February* 1835, before putting in the foregoing answer, filed his cross bill in the *Irish* Court of Chancery, against *J. H. Ollney*, *Margaret Powell*, and *William Charles King*, and thereby stated the original bill of *J. H. Ollney*; and also stated and charged the several matters contained in the Appellant's said answer, or to that effect. And the Appellant, by his cross bill, prayed that the said indentures of the 21st of *December* 1825, 27th and 28th of *July* 1827, and his bonds to *Ollney*, bearing date the 21st of *December* 1825 and 27th of *July* 1827, might be set aside as fraudulent and void, and be delivered up to be cancelled, upon payment by the Appellant of the principal sums actually and *bona fide* paid to him on the occasion of the execution of the said deeds, after deducting all such sums as the Appellant, by fraud or imposition, was compelled to repay or allow to *L. H. Robinson* and *W. R. King*, at the desire and by the contrivance of *J. H. Ollney*; which principal sums, with interest thereon from the time they were respectively advanced, the Appellant thereby undertook to pay: and that the said annuity deed of the 28th of *July* 1827 might be set aside, and delivered up to be cancelled; and that an account might be taken of the sum due for principal and interest on foot of the sums

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actually and *bonâ fide* received by the Appellant for his own use at the time of the said respective alleged advances, and also an account of the sum of 5,000*l.* advanced to him on the 2d of *March* 1833, with interest; and that the said several deeds and securities obtained by *Ollney*, if not altogether set aside, might be deemed to be securities only for the sum or sums of money which, upon the taking of the accounts should appear due on foot of the said advances; and that upon payment thereof, *Ollney*, *Margaret Powell*, and *W. C. King*, should be directed to release and convey to the Appellant the several lands and premises so conveyed to them, freed from all incumbrances whatsoever, made by them.

J. H. Ollney put in his answer to the cross bill, and thereby insisted on his title to the whole relief prayed by his original bill. *W. C. King* and *Margaret Powell* likewise put in answers to the cross bill. *Margaret Powell* subsequently died, and *J. H. Ollney* died in *January* 1836, having made his will, and appointed the Respondents his executors, who duly proved the same in the Prerogative Court in *Ireland*. The bill and cross bill were revived soon afterwards, and both causes being at issue, witnesses were examined for the Appellant and Respondents.

The witnesses for the Respondents proved the execution of the deeds before mentioned, and the payment of the sums of 6,000*l.* and 10,000*l.* and 5,000*l.* to the Appellant, and of 750*l.* by *Ollney* to *Robinson*, and that *Robinson* was the agent of the Appellant in those transactions.

The witnesses for the Appellant proved his distress and embarrassments in 1825-6-7-8, and that his father was 79 years of age in 1825, and himself only 42, and in good health; and that, according to

the tables for calculating reversionary interests at the Insurance Offices, the sums of 6,000*l.* and 10,000*l.* were not adequate prices for the contingent sums of 12,000*l.* and 20,000 *l.*

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The causes came on to be heard before the Lord Chancellor of *Ireland*, who by his decree, dated 7th of *February* 1837, ordered and decreed that it should be referred to the Master to inquire and report whether, under all the circumstances, the sums of 6,000*l.* and 10,000*l.*, paid by *John Harvey Ollney* to the Appellant, on the 21st of *December* 1825, and the 27th of *July* 1827, respectively, were the fair market prices for the sums of 12,000*l.* and 20,000*l.* secured to be paid to *Ollney* by the Appellant at the time and in the manner in the pleadings mentioned, taking into consideration the relative ages, at the time, of the Appellant and his father, *Benjamin O'Neale*, then Earl of *Aldborough*, and the circumstances of the property whereon said sums of 12,000*l.* and 20,000*l.* were intended to be secured, and the estate and interest of the Appellant therein, and the other circumstances in the pleadings mentioned, relative to the transactions.

The Respondents and the Appellant proceeded before the Master under that decree, and all the proofs in the original and cross causes were there entered as read; and in addition thereto, the Respondents examined six witnesses, actuaries and auctioneers, who differed very much in regard to the question of market-price value of the 12,000*l.* and the 20,000*l.* The Master by his report, dated the 28th of *March* 1838, found that the sums of 6,000*l.* and 10,000*l.* paid by *Ollney* to the Appellant, on the 21st of *December* 1825, and the 27th of *April* 1827, respectively, were the fair market prices for said sums of 12,000*l.* and 20,000*l.* secured to be paid to him by the Appellant, at the times and in the manner in the pleadings mentioned.

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The causes came on to be heard upon the said report and merits and further directions, before the said Lord Chancellor, when his Lordship, by a decree dated the 26th of *April* 1838, was pleased to order and decree that the said report should stand confirmed; and that the said two sums of 12,000*l.* and 20,000*l.* secured by the said deeds, bearing date respectively the 21st of *December* 1825, and 27th of *July* 1827, and interest thereon respectively at the rate of 5*l. per cent. per annum* from the 10th of *October* 1833 until paid, were charges on the lands and premises in the pleadings mentioned, and that the Respondents were entitled thereto. And his Lordship further ordered and decreed that the Respondents were also entitled to the sum of 5,000 *l.* secured by the said deed dated the 2d of *March* 1833, with interest thereon at the rate of 6*l. per cent. per annum*, to be computed from the 2d *March* 1833 until paid. And his Lordship declared that the Respondents were not entitled to the said annuity of 200*l.* a year, granted to *L. H. Robinson*, and assigned to *J. H. Ollney*; but that the deeds granting and assigning the same were only to stand as a security for the sum of 750*l.*, being the consideration-money paid by *Ollney* to *Robinson* for the purchase of the said annuity, with interest thereon from the 4th of *March* 1833, at the rate of 5*l. per cent. per annum* until paid; and his Lordship ordered that the bill in the original cause should stand dismissed without costs, so far as the same sought to establish the annuity. And his Lordship referred it to the said Master to take an account of what was due to the Respondents for principal and interest in respect of the aforesaid several sums of 12,000*l.*, 20,000*l.*, 5,000*l.*, and 750*l.*; and also to take an account of all incumbrances prior to their demands affecting the estates of the Appellant in the pleadings mentioned,

in which said accounts all just and fair allowances were to be given; and the Master was to be at liberty to advertise for all persons having or claiming to have any such prior incumbrances as aforesaid, to come in and prove the same before him. And his Lordship further ordered that the Respondents should have their costs as plaintiffs in the first cause, and as defendants in the second cause, including the costs of the reference under the decree of the 7th of *February* 1837, as against the Appellant, and the lands and premises in the pleadings mentioned.

The Appellant considering himself aggrieved by the decree of the 7th of *February* 1837, the report of the 28th of *March* 1838, and by the decree of the 26th of *April* 1838, appealed therefrom respectively.

Mr. *Pemberton* and Mr. *Knight Bruce*, for the Appellant:—Upon the principles by which Courts of Equity are governed, it was incumbent on the Respondents, in order to support the two *post-obit* transactions, to have proved, at the hearing of the causes in 1837, that the value had been paid by their testator, the purchaser of the two *post-obits*, at the times when he became the purchaser; *Peacock v. Evans* (a), *Gowland v. De Faria* (b), *Davis v. The Duke of Marlborough* (c), *Lord Portmore v. Taylor* (d). Not only did the Respondents fail to do this, but it was proved against them by the Appellant distinctly, by uncontradicted evidence, that the value had not been paid on either occasion; and therefore relief ought to have been given to the Appellant, at the original hearing, according to the prayer of his cross bill, without further inquiry.

Inadequate as the purchase-monies for these secu-

(a) 16 Ves. 512.

(b) 4 Sim. 162.

(c) 2 Swanst. 139.

(d) 17 Ves. 20.

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rities were, there were several very large deductions from them in payments to Mr. *King*, the solicitor, and to Mr. *Robinson*. In the Appellant's pressing difficulties, he was unable to resist the demands of those persons; and as to the securities themselves, they were not what he agreed on, and he executed them without professional advice.

On the supposition that it was proper to direct any inquiry at the original hearing, the inquiries directed by the decree then made were not such as the nature and circumstances of the case required or rendered proper. Whether that decree was right or wrong, the Master's report was erroneous, and not warranted by the evidence before him.

The decrees have not done justice to the Appellant, either as to the costs of the suits, or as to the annuity of 200*l.*; as to which there was no just ground upon which to charge the Appellant, as he is by the last decree charged, with the 750*l.* alleged to have been paid by *Ollney* to *Robinson*.

The *Attorney-general* and Mr. *Jacob*, for the Respondents:—The decrees and report are consistent with the evidence, by which it was clearly shown that the two sums of 6,000*l.* and 10,000 *l.* were paid by Mr. *Ollney* to the Appellant, and that those sums were, under all the circumstances affecting the Appellant and his reversionary interest at the time, fair and ample considerations for the contingent sums secured by him to Mr. *Ollney*. The Appellant was fully competent to bind himself by the deeds, which he deliberately executed, and no improper advantage was taken of him. *Robinson* was his own agent.

There was no dispute as to the 5,000*l.*, the consideration for the indentures of the 1st and 2d *March*

1833. That sum was *bonâ fide* paid by Mr. *Ollney* to the Appellant; and the provisions contained in the indenture of the 2d of *March* 1833 were such as he had reasonably a right to require; and unless the same had been inserted, he would not have made the advance of 5,000 *l.*

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The sum of 750*l.* paid by Mr. *Ollney* to *Robinson* as the consideration for the deed of assignment of the 4th *March* 1833, was actually and *bonâ fide* paid; and if any grounds had existed, as between the Appellant and *Robinson*, for impeaching the annuity of 200 *l.*, *Ollney* had no notice of it. The transaction is, at all events, valid and unimpeachable to the extent of the sum of 750*l.* and interest. If the Appellant considered himself aggrieved by the original decree directing the inquiries by the Master, the decree of *February* 1837, he ought to have appealed against it without delay; and if he considered the report of the Master improper, he ought to have taken exceptions: the report not having been excepted to, is conclusive against the Appellant.

[They cited, in addition to the cases referred to in the reply, and stated in the Lord Chancellor's judgment, on the point of adequacy of consideration, *Moth v. Atwood* (*d*); and *Whichcote v. Bramston* (*e*), on the same point, and on the conclusiveness of the Master's report when not excepted to.]

Mr. *Pemberton*, in reply:—The rule as to adequacy of value was undoubtedly relaxed by Chief Baron Sir *William Alexander*, in *Headen v. Rosher* (*f*), in respect of the sale of reversions. He had laid it down more correctly in *Ryle v. Swindells* (*g*). The pro-

(*d*) 5 Ves. 845.

(*e*) 4 Sim. 202 (note).

(*f*) 1 M'Cle. & Y. 89,

(*g*) M'Cle 519.

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tection which the Court gives to expectant heirs in the disposal of their expectancies remains unchanged. Inadequate as the stipulated considerations for the sums of 12,000 *l.* and 20,000 *l.* were, they were paid with large deductions under the description of costs, commission, and gratuities to Mr. *King*, the solicitor, and to Mr. *Robinson*.

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The *Lord Chancellor* :—In this case I was desirous, before I stated to your Lordships any opinion I had formed on the arguments, to have an opportunity of looking into the pleadings, particularly with respect to the annuity of 200 *l.* The cause came on upon a bill and cross bill; the object of the cross bill being to set aside certain *post-obit* securities, given by the present Lord *Aldborough*, during the lifetime of his father. When the cause came to be heard before the Lord Chancellor of *Ireland*, a reference was made to the Master to inquire, “Whether, under all the circumstances, the sum of 6,000 *l.* paid by *J. H. Ollney* to the now Earl of *Aldborough*, was a fair market price for the sum of 12,000 *l.* secured to *Ollney* at the time and in the manner in the pleadings mentioned, taking into consideration the relative ages, at the time, of the said Earl of *Aldborough*, and his father, *Benjamin O’Neale*, then Earl of *Aldborough*, and the circumstances of the property whereon the said sum of 12,000 *l.* was intended to be secured, and the estate and interest of the defendant, the Earl of *Aldborough*, therein, and the other circumstances in the pleadings mentioned relative to the said transaction.” There was a similar inquiry directed in respect of the sum of 10,000 *l.*

Upon this reference, on the 7th of *February* 1837

the Master made his report, by which he found that under all the circumstances the sum of 6,000*l.* paid by *Ollney* on the 21st of *December* 1825, was a fair market price for the sum of 12,000*l.*, secured to be paid to *Ollney* at the time and in the manner in the pleadings mentioned. There was a similar finding with respect to the sum of 10,000*l.* No exceptions were taken to this report. It was at one time supposed that there was some informality in the manner in which the report was confirmed. That supposition was removed, and there appears now to be no irregularity in the mode in which that report was dealt with upon the decree for further directions. The case, therefore, stands upon the report not complained of, establishing the fact that, with regard to those two sums, the sums paid by *Ollney* were under all the circumstances of the case fair prices for the sums secured by Lord *Aldborough*, in his then situation of expectant heir.

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My Lords, two grounds of objection have been taken to the course adopted by the Court of Chancery in *Ireland*. The first is, that the Master's finding did not justify the decree upon further directions, by which the security was enforced against the estates charged with it. The other is that, however that might be, yet, upon the original decree, inasmuch as it was not then proved that the price given was a fair price, it was the duty of the Court to have granted the relief prayed by the cross bill.

On the second ground of objection, I propose to state my opinion first; and I think your Lordships will not be disposed to give much weight to that objection. The party takes the inquiry, and does not complain of the decree directing it till after the result of the inquiry is ascertained to be against him. Al-

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though undoubtedly it is competent to him to complain of the original decree, it is not a complaint to which your Lordships will be very ready to listen. If he can show that there was any error in that decree, he is not precluded from stating his complaint; but in a matter, which is purely matter of discretion, where the Court thinks it has not sufficient information to enable it to administer justice between the parties, it either directs an issue to a jury, or an inquiry by the Master, for the purpose of better ascertaining the facts: it did so here, and when your Lordships find, upon that inquiry, that the facts led to a conclusion against the plaintiff, your Lordships will not be much disposed to set aside the whole proceeding, because the Court exercised the discretion of directing that inquiry in order to ascertain the facts. I conceive it was quite competent to the Court, and that the Court exercised a very sound discretion in directing that inquiry. It appears to be established by several cases, that where a party deals with an expectant heir, the *onus* is upon him to show that he gave a fair price for that which he purchased. It does not from that proposition follow that he is bound to establish it in a different way from that in which it is competent to any other suitor to establish any other fact upon which his cause rests; and if, when the cause comes to a hearing, the Court finds that it requires further inquiry to ascertain the facts necessary for the due decision of the case, that is a matter so entirely in the discretion of the Court, that a complaint resting upon that ground is not one to which your Lordships would very readily yield.

Now I think I shall in a few words satisfy your Lordships, that there was no evidence in this case to enable the Court satisfactorily to dispose of the

question between the parties. The Court, therefore, directed an inquiry, and the result of that inquiry is what I have stated. That, however, leaves entirely open the question, whether the result of the inquiry by the Master entitled the party, claiming the benefit of the security, to a decree to enforce it, or whether it would have entitled the party who was seeking to have that transaction set aside, to have a decree for that purpose.

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In order to support the proposition set up on the part of Lord *Aldborough*, who complains of these securities, and seeks to have them set aside, it was argued, that in the case of *Gowland v. De Faria* (h) the proposition had been established. There are two propositions, one of which was established, and the other *supposed* to be established, in that case. The one said to be established was that, in a transaction with an expectant heir, it was necessary for the party seeking the benefit of that transaction to show that he gave a fair price: but that proposition has been the subject of much observation undoubtedly since that decision took place, and it has been considered as interfering a good deal with that proper discretion, which persons, who are capable, according to the law of this country, of disposing of their property, ought to be at liberty to exercise. At the same time it does establish a rule, which has the effect of protecting persons, who are, generally speaking, very much in need of protection. Of the policy of that rule it is not my purpose to say anything; that rule has been established in the case of *Gowland v. De Faria*, and has been recognised since.

But another proposition has been *supposed* to be established by that case, which is, that in transactions

(h) 17 Ves. 20.

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of this sort, the Court has only to look at the value of the reversionary interest calculated according to the tables; that is to say, how much of the value of the property is to be deducted on account of its being a postponed interest—postponed by the chance of the duration of another's life,—and that that is capable of being reduced by calculation to what is considered a fair reduction with reference to the duration of the life on which it is dependent. I do not find any such proposition established by Sir *William Grant* in that case. Sir *William Alexander*, in the case of *Headen v. Rosher* (i), and Lord *Lyndhurst*, in the case of *Potts v. Curtis* (k), entertained the same opinion: and upon looking at the language of Sir *William Grant*, it does appear to me that that rule is not at all to be extracted from it. In that case there was no evidence but that of the actuaries, and the evidence of the actuaries proved that the sum given was not the marketable value of the reversion. Sir *William Grant*, in observing on the case, states the evidence before him, namely, that of the actuaries; and says there is no other evidence in the case; and he then proceeds upon that evidence, there being no other. Now the only observation I will make upon that case is, that one may suppose it would have been a more wholesome course to have adopted—seeing that the evidence was only the evidence of the actuaries, and the Court being of opinion that that was not evidence which ought to be conclusive in a case of that description between these parties—I say it would seem to have been better to have adopted some course for the purpose of ascertaining more correctly the value, in the sense in which that term is to be used in

(i) M'Clelland & Y. 89.

(k) 1 Younge, 543.

inquiries of that kind. Sir *William Grant*, however, did not adopt that course, and he decided it upon the only evidence he had, that only evidence being to the effect that an inadequate consideration had been given. It is, therefore, not an expression of opinion by Sir *William Grant* that that is a rule that ought to be adopted. It is only a dealing with that case with reference to its own particular circumstances. That rule has been disapproved of by subsequent decisions of the highest authority. It was disapproved of by Sir *William Alexander*, in a judgment, the reasons of which are very conclusive to show the soundness of the conclusion at which he arrived (*l*). It was also objected to and disapproved of by Lord *Lyndhurst*, in the case to which I have referred (*m*): and if your Lordships consider what the effect of that rule would be, how inapplicable it is to the great mass of cases, how little calculated it is to lead to a right conclusion, and how much it must interfere with the right of disposing of property, I am sure your Lordships will not hesitate in preferring the rule which has been established in the subsequent cases, to that which has been supposed to have been established in the case of *Gowland v. De Faria*. It is sufficient to say that the establishment of that rule would make it impossible for an expectant heir to dispose of his interest at all. That, I apprehend, is quite a sufficient objection. It is a rule also, which, as a general rule, being calculated on the result of a great mass of cases, must apply with great injustice in a great variety of individual cases. The lives are supposed to be of average value, but the life in question may be an extraordinarily good, or an extraor-

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(*l*) *Hcaden v. Rosher*, 1 M'Cle. & Y. 89.

(*m*) *Potts v. Curtis*, 1 Younge, 543.

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dinarily bad one; which is likely to last beyond the usual time, or the contrary. How then can it be right to establish a rule not applicable to the particular case, but applying to a mass of cases collected together, and to make that rule govern an individual case, to which it may not at all apply?

My Lords, I will not go further into my reasons for not adhering to that supposed rule. The matter having been very fully and very ably discussed by Sir *William Alexander* and by Lord *Lyndhurst*, it appears unnecessary further to discuss it here, than to say that I entirely concur in the reasons of those two very learned Judges, and I do not think that the rule supposed to be extracted from *Gowland v. De Faria* is a rule which ought to be laid down. Then, if that be so, in what position does the present case stand? Taking the report as establishing the fact,—the cross bill having for its object to set aside these transactions, and it being established as a fact that these transactions are fair and proper transactions, regard being had to all the circumstances of the case,—I will only observe that the cases of *Shelley v. Nash* (n), and *Baker v. Bentt* (o), although they are not expressly to the same point, yet they establish this proposition, that the market price is the thing to be looked at; for if the market price is not the thing to be looked at, how is it established that a sale by auction is within the rule, or sale by auction is a means of ascertaining the market price? It is a means of ascertaining as nearly as it can be ascertained, that the sum which the thing will fetch in the market is the sum which the thing is worth; and therefore negatives the imputation of fraud.

This case, therefore, stands upon the fact being

(n) 3 Madd. 232.

(o) 1 Russ. & Myl. 224.

established that that sum which was given was the fair market price : now taking that as a fact which is established, and which, therefore, constitutes a proposition fixed between the parties, that the party buying gave the fair market price under all the circumstances ; that that is the proposition your Lordships have to decide, and which the Court of Chancery in *Ireland* had to decide, it is impossible that the case on the part of the Appellant can be maintained for a moment, unless the doctrine be established which is supposed to be extracted from *Gowland v. De Faria*. This transaction now cannot be any further questioned. It appears to me to be established that the fair market price was given for these bonds and other securities, regard being had to all the circumstances of the case, to all the facts which are referred to in the pleadings, all of which were material in order to fix the price that was fair and proper for Mr. *Ollney* to give to Lord *Aldborough* under the circumstances. I apprehend, therefore, that as soon as it is established that the doctrine supposed to be extracted from *Gowland v. De Faria* is not the doctrine of a Court of Equity, and as soon as it appears that the parties are precluded from disputing the finding of the Master, the question is in substance disposed of as far as relates to these two sums of 6,000 *l.* and 10,000 *l.*

One other part of the case only remains, and that is a point upon which I was desirous of examining the pleadings, which unfortunately upon that, which is the only part of the case involving any difficulty, are not printed in the papers. There was an annuity given, and a deed, not of the same date, but alleged to have been part of the same transaction, dated on the day after the grant of one of these securities. It is an annuity given to Mr. *Robinson*; and at a subsequent period, Mr. *Ollney*, the grantee of the other secu-

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rities, is alleged to have purchased from Mr. *Robinson* this annuity for 750 *l.* The case made by the cross bill is that it was a mere fiction, in order to give an appearance of validity to the transaction which did not in fact belong to it; that Mr. *Robinson* was only a trustee or agent for Mr. *Ollney*; that it was intended as an additional benefit to Mr. *Ollney*. The cross bill stated in substance, that Mr. *Robinson* was the agent and attorney for Mr. *Ollney*, not for Lord *Aldborough*, and that his name was used for the purpose of securing this benefit to Mr. *Ollney*, and that the 750 *l.* either was not paid at all, or was only colourably paid. That case has entirely failed; it is established that Mr. *Robinson* was the agent for Lord *Aldborough*; and it is established that the annuity was granted for Mr. *Robinson's* benefit in the first instance, and that Mr. *Ollney* afterwards paid 750 *l.* to Mr. *Robinson*. Now the cross bill does not impeach the transaction as a transaction in which an attorney has secured, improperly, a benefit to himself from his client; it does not attack it upon that ground at all. The grounds upon which it is impeached, and upon which it is sought to take the benefit of that purchase from Mr. *Ollney*, have entirely failed. I may assume that this is not affected at all with fraud, but that it was a voluntary annuity, because that is admitted by the other party; that is to say, voluntary so far that there was no money consideration paid for it. Whether it was earned by any services we do not know, but we know that it was not the subject of a money consideration, nor of purchase, between Mr. *Robinson* and Lord *Aldborough*. That was a transaction in 1828. Five years afterwards, in 1833 (nothing in the meantime being done for the purpose of questioning the security, it being a security under the hand of Lord *Aldborough*), Mr. *Ollney* purchased it, and paid

750*l.* for it ; and the decree does confer this benefit upon Lord *Aldborough*, that it sets aside the transaction, but it requires him to pay the 750*l.* which had been paid by Mr. *Ollney*, with interest ; and as against him, the decree is to operate by setting aside the annuity which he had purchased.

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Now when we consider that the cross bill does not attack the annuity upon any other ground than want of consideration, except that imputed combination between Mr. *Robinson* and Mr. *Ollney* which is not established in fact, but which is disproved, I think that Lord *Aldborough* has got as much benefit from the Court of Equity in *Ireland* as he could reasonably expect, because he has the benefit of that transaction being set aside. He has not got the benefit of that transaction being set aside without repaying the money actually paid by Mr. *Ollney* for the purchase ; and I apprehend that even if the bill had impeached the transaction in a different and more correct mode than this, he never could have had ground upon the facts, as they stand here, to have got any decree to set aside that transaction without repaying the party what had been actually paid. If a man puts into the hands of another the means of obtaining money from a third person, he never can be able to get a decree to get rid of that transaction, arising out of the security which he has entrusted to another, and of which he, the party complaining, was the author, without first repaying the money thus obtained.

That has been established in the case of voluntary deeds. In the case of *George v. Milbanke (p)*, Lord *Eldon* established this, that even as against creditors, where the party had been the author of a voluntary deed, and that voluntary deed had been used by the

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holder of it for the purpose of either raising money upon it, or for sale, that even a creditor in the case of bankruptcy could not get it back without repaying the money that had been paid for it: but here the application is made by the author of this, which is a voluntary deed altogether, to deprive the party of the benefit he is to derive under it. Now a voluntary deed is not impeachable upon those grounds upon which we know that many transactions between man and man are set aside. Here the author of a voluntary security comes into a Court of Equity, and asks the Court to set aside the transaction against the party who has purchased the benefit conferred by it, without paying him that which he has paid himself. I think that the equity which the Court of Chancery in *Ireland* has administered in that respect is perfectly correct, and that the way in which the Appellant has put his case is not sustainable against the decree, against which he has come to your Lordships' bar to complain.

Under all these circumstances, it appears to me that the Court of Chancery was quite justified in the decrees which it has made, and that the Appellant has failed in making out his case to your Lordships. I should propose therefore to your Lordships to affirm the decrees below, with costs.

Lord *Brougham*:—I entirely agree with the view which my noble and learned friend has taken in both parts of this case; the latter part being the only part about which any doubt could exist. I also agree with him that Lord *Aldborough* has had quite as much benefit as he could have expected in the Court below. With respect to what has been said of the case of *Gowland v. De Faria*, and the doctrine supposed to be laid down in that case, two questions might arise:

the first is, whether the doctrine really exists in that case, which has been supposed there to exist. Upon that point I have some doubt; but if that doctrine is justly imputed to the case of *Gowland v. De Faria*, I entirely agree with my noble and learned friend in the view which he takes, and which was taken by Lord *Lyndhurst* in the case of *Potts v. Curtis*, that that doctrine, if it exists at all in that case, is now to be considered as overruled. It certainly never could have been the intention of the rule, with respect to expectant heirs dealing with a purchaser, that they should not have the power of dealing at all with their reversion. The rule laid down by the Courts has certainly made that dealing very difficult; it has discouraged that dealing, for the purpose of protecting an expectant heir; it has made that discouragement very great indeed; but unless it is intended to say that the practical object of the rule was what undoubtedly in effect it would be, were the doctrine supposed to exist in *Gowland v. De Faria* still maintained, unless it is meant to say that they shall practically never dispose of their reversion at all, it appears to me clearly impossible to maintain that supposed doctrine. I think in many cases such a rule would be anything rather than a protection to an expectant heir. Upon the whole, therefore, I entirely agree with the view taken by my noble and learned friend. The matter never, indeed, admitted of any considerable doubt; it was only with respect to the point I first mentioned, and which was last dealt with by my noble and learned friend, that the case stood over for consideration.

The appeal was dismissed, and the decrees complained of were affirmed, with costs.

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Feb. 21, 22. Her Most Faithful Majesty, DONNA }
27. MARIA, the Second, QUEEN of POR- } *Appellant.*
1840 :
July 2. TUGAL and THE ALGARVES - - - }

SIR RICHARD CARR GLYN, Bart., }
THOMAS HALLIFAX, RICHARD PLUM- } *Respondents.*
TREE GLYN, CHARLES MILLS, and }
GEORGE CARR GLYN - - - - }

Discovery.
Pleading.
Parties.
Demurrer.
Foreign
Sovereign.

A BILL of discovery in aid of a defence to an action cannot be sustained against a person who is not a party to the record at law, although charged in the bill to be solely interested in the subject of the action.

Bills filed by or against underwriters, as they pray some relief, do not form an exception to the rule: but if to a bill of discovery in aid of a defence to an action brought on a policy of insurance by the agent alone his principal is made a defendant, the latter may demur, although he is exclusively interested in the subject of the action.

Bills of discovery are permitted for the purpose of obtaining from the adversary at law a discovery of matters, which, being admitted by him, may aid the defence to the action, but not for the purpose of obtaining evidence; accordingly a bill of discovery does not lie against a person who may be a witness for the defendant in the action.

A loan raised in 1833, for Don *Miguel*, as King of *Portugal*, for the use of his government, consisted partly of bills of exchange, in two parts, drawn upon bankers in *London*, who accepted the first parts in the course of their business for a customer. The second parts, having been remitted to the treasury of *Portugal*, indorsed to the treasurer of the royal treasury there, on account of the loan, came, after the dethronement of Don *Miguel*, into the possession of Queen *Donna Maria*, and were by her orders indorsed by the treasurer to *Soares* in *London*, with instructions to recover the amount. An action having been brought by *Soares* on the bills, against the acceptors, they filed a bill of discovery, in aid of their defence, against him and the Queen of *Portugal*, charging that she was interested in the bills of exchange.—HELD by the Lords (reversing an order of the Court of Exchequer), that, as the Queen of *Portugal* was not a party to the record at law, she was not a proper party to the bill of discovery.

THIS was an appeal against an order of the Court of Exchequer, overruling the Appellant's demurrer to a bill of discovery filed against her and *Manoel Joaquim*

Soares, by the Respondents, in aid of their defence to an action brought against them by *Soares* to recover the proceeds of certain bills of exchange.

The bill, which was filed in 1835, stated, among other things, that the Respondents carried on, in co-partnership together, the business of bankers in *London* in the year 1833, and ever since: That from the year 1829, and throughout the first six months of 1833, Don *Miguel* was *de facto* King of *Portugal*, and exercised by himself and his agents all the functions of government in that country: That in the early part of 1833, Don *Miguel* and his government had occasion to raise a loan for the exigencies of the same government, and Messrs. *Outrequin & Jauge*, bankers in *Paris*, entered into an agreement with him and his government for raising such loan in *Paris*, and for remitting the same to the treasurer of the royal treasury in *Portugal*, appointed by and acting under the authority of Don *Miguel* and his government, to be applied by such treasurer for their use and service: That *Outrequin & Jauge*, between the 1st of *March* and the 30th of *June* 1833, subscribed and advanced, and procured to be subscribed and advanced by various other parties in *Paris* and elsewhere, considerable sums of money by bills of exchange or otherwise, for the use or on account of Don *Miguel* and his government, upon the security of certain scrip or bonds issued by Don *Miguel* and his government; and that they remitted a great part of the amount so raised and subscribed to the said treasurer so appointed as aforesaid, in bills of exchange, among which were six bills accepted by these Respondents: That from *March* to *July* 1833, Don *Pedro*, Duke of *Braganza*, was engaged in an attempt, by means of foreign auxiliaries, to expel Don *Miguel* from the

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throne of *Portugal*, and to establish in his stead Donna *Maria da Gloria*, the Appellant; and that the object of the said loan was to furnish Don *Miguel* with the means of resisting such invasion, and of maintaining his government: That the bills so remitted on account of the said loan were remitted to *Joaquim Fernandez Conto*, and received by him as the treasurer of the royal treasury of *Portugal*, appointed by Don *Miguel*: That Baron *D'Est*, of *Paris*, drew upon the Respondents the six several bills before mentioned, for the sums of 650 *l.*, 450 *l.*, 550 *l.*, 750 *l.*, 450 *l.*, and 550 *l.* respectively, all dated in *June* 1833, and payable 90 days after their respective dates, to the order of *Outrequin & Jauge*: That Baron *D'Est*, according to the custom of merchants, made each of the said bills in two parts, and by the second of such parts respectively required the Respondents to pay the amount to *Outrequin & Jauge*, the first parts not being paid: That both parts of the said bills were delivered by Baron *D'Est* to *Outrequin & Jauge*, and the first parts were remitted by them to their agents in *London*, Messrs. *Gower, Nephews, & Co.*, who received the same with directions to present them for acceptance, and to hold them when accepted for the holders or indorsees of the second parts: That the first parts of such bills were duly presented to and accepted by the Respondents, who were not subscribers to the said loan, but accepted the said bills in the course of their business as bankers, on the account and by the directions of one *Edward Richardson*, who kept an account with them as bankers, and that they had not any interest in the said bills save as such acceptors on behalf of *Richardson*, and that in filing this bill of discovery these Respondents acted merely as they were advised they were bound

to do as the agents and by the directions of *Richardson*, who, as the party beneficially interested, had the sole management of the action at law in aid of the defence, to which the discovery was sought, and of this suit.

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The bill further stated that *Outrequin & Jauge* indorsed each of the second parts of the said bills as follows: "Pay to the order of the Treasurer-general of the Royal Treasury of *Portugal*, value in account of the negotiation of the royal loan of *Portugal*;" and the bills so indorsed were transmitted to the office of the royal treasury of *Portugal*; and the same were received by the said *J. F. Conto*, who exercised the functions of treasurer under the authority of Don *Miguel* and his government, and never was and never acted as the treasurer of the royal treasury of *Portugal*, except under such authority, and had no power to dispose of or negotiate any of the said bills, except under the directions of Don *Miguel* or his government.

The bill next stated that Don *Miguel*, in consequence of the misfortunes, which attended his armies and fleet, and the approach of a hostile army, abandoned *Lisbon* on the night of the 23d of *July* 1833; and Donna *Maria da Gloria* was proclaimed Queen of *Portugal*, under the title of "Donna *Maria*, the Second;" and that Don *Pedro* and his adherents, acting on her behalf, took possession of *Lisbon*, and assumed and exercised the functions of government; but that such government was entirely distinct from, and founded upon the destruction of, the government of Don *Miguel*: That Don *Pedro* and his adherents took possession, on behalf of the Appellant, of the second parts of the said six bills of exchange, among many other similar bills which were in the royal treasury at *Lisbon*, and caused them to be indorsed and

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transmitted to *Manoel Joaquim Soares*, merchant in *London*, for the purpose of recovering the amount thereof; and such indorsements purported to be signed by *J. F. Conto*, and were dated the 7th of *August* 1833, which was after *Conto* had ceased to be treasurer of the royal treasury of *Portugal*, on behalf of Don *Miguel*: That such indorsements, if made by *Conto*, were made by him without authority, and in fraud and violation of the duties which devolved upon him as the agent of Don *Miguel*, entrusted with such securities: That the loan so raised, and the bonds or scrip issued by Don *Miguel* and his government, were not recognised by the Appellant or her government; but, on the contrary, that they declared the same to be void and not binding on the kingdom of *Portugal*; and that neither the Appellant nor any person on her behalf had given or agreed to give any valuable consideration for the said six bills of exchange: That the possession of the second parts of the said bills was obtained by the Appellant or the persons acting on her behalf by fraud, accident or violence, and that they did not, nor did any of them, thereby acquire any beneficial interest in or title to the said bills: That as soon as *Outrequin & Jauge* discovered that the said bills of exchange had fallen into the hands of the Appellant and the persons acting on her behalf, they gave instructions to *Gower, Nephews, & Co.*, not to deliver up the first parts of them, and to resist all claims to them on the part of the Appellant or her government, or any person claiming title through them, and none of these bills were presented for payment when they respectively arrived at maturity.

The bill then stated that, besides the said bills of exchange, another bill, in two parts, dated the 2d of

June 1833, and payable in 90 days after date, was drawn by Baron *D'Est* upon the Respondents, the first part of which was remitted to *Gower*, Nephews, & Co., who procured the same to be accepted by the Respondents; and the second part was, like the former bills, remitted to *Lisbon*, where it was indorsed by *Conto* to *Soares*, who by some means obtained possession of the first part, and presented the same for payment to the Respondents: That to such application the Respondents gave the following answer: "This bill, being by the indorsement of Messrs. *Outrequin & Jauge* made payable, not to an individual, but to a public officer, whose name does not appear; and circumstances having transpired, which give the acceptors reason to doubt whether the person, who has taken upon himself to indorse it, is the person intended by Messrs. *Outrequin & Jauge*; the acceptors, though ready and willing to pay the amount, require, before doing so, satisfactory evidence of the right of *Conto* to indorse this bill as the treasurer-general of *Portugal*, mentioned in Messrs. *Outrequin & Jauge's* indorsement:" That thereupon *Soares* instituted proceedings in the Tribunal of Commerce at *Paris* against the Baron *D'Est* and *Outrequin & Jauge*, to recover the amount of the said bills, and that tribunal found that *Soares* was not a *bonâ fide* holder of the bills, and gave judgment against him accordingly. And the bill further stated that, nevertheless, on the 19th of *June* 1835, the Appellant and her agents caused an action to be commenced in the name of *Soares* against the Respondents, in the Court of King's Bench, *Westminster*, to recover the amount of the said six bills of exchange: That *Soares* pretended that he was a holder of the said bills for valuable consideration, and meant to insist in his

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said action on his right to recover in that character; whereas he was a mere agent of the Appellant or her government, and had no property or interest in the said bills, or any of them; and as evidence thereof, the bill stated certain proceedings in a suit instituted in the Court of Chancery by *Soares* against the said Messrs. *Gower*, Nephews, & Co. The bill proceeded to make a number of charges in support of that allegation, and that the Appellant had personal knowledge of many of the circumstances stated; and it prayed for a discovery of the several matters charged in the bill, in aid of the Respondents' defence to the action, and for commissions to examine the Respondents' witnesses at *Lisbon*, *Paris*, and elsewhere, and that in the meantime the Appellant and *Soares*, and their agents, and the agents of each of them, might be restrained, by injunction, from continuing or commencing further proceedings at law against the Respondents.

Soares put in an answer to the bill, admitting that he, personally, had no property in the said bills of exchange, and did not give any consideration for them, but that he had been directed by the Appellant's government to receive the proceeds of them, and remit the same to the treasury at *Lisbon*; and concluding by submitting that the Appellant was improperly joined as a defendant to the suit, inasmuch as she was not a party to the action.

The Appellant not having appeared to the bill, the Respondents obtained an order for making service of subpœna on *Soares*, and his attorney in the action, good service on her(a). An appearance was then entered for her Majesty, and a demurrer on her

(a) 1 Younge & C. 648.

behalf was put in to the bill, on two grounds: 1st, That she was improperly joined as a defendant to the bill as she was not a party to the action at law; 2dly, That such of the matters as were well pleaded in the bill, if admitted to be true, would not constitute a valid defence to the action at law.

The demurrer was argued before Lord *Abinger*, C. B., on the 15th of *December* 1835, and was overruled by his Lordship's order, dated the 19th of *January* 1836(b).

The appeal was against that order.

Mr. *Pemberton* and Mr. *Roupell*, for the Appellant:—According to the principles and practice of Courts of Equity, bills for discovery, in aid of, or in defence to, actions at law, cannot be maintained except by and against the parties to the record at law. That is the general rule, established by a long succession of decisions; from *Fenton v. Hughes* (c) to *Irving v. Thompson* (d). In the case of *Glyn v. Soares* (e), which was a bill of discovery filed in the Court of Chancery by the present Respondents and Mr. *Richardson* against the Appellant and *Soares*, the Master of the Rolls held that as *Richardson* was not a party to the action for the defence to which the discovery was sought, he was improperly joined as co-plaintiff in the bill, and was not entitled to the discovery, although he was the party chiefly interested. This is the converse of that case; and there the Master of the Rolls said (f), “The making the Queen of *Portugal* a defendant cannot possibly be correct in any view consistent with the object for which

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(b) 1 Younge & C. 653.

(c) 7 Ves. 287.

(d) 9 Sim 17.

(e) 3 Myl & K. 450.

(f) Id. 468.

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the bill professes to be filed ;” but his Honor did not think it necessary, in that stage of the case, to express any opinion on the question whether the Queen of *Portugal* could demur, the misjoinder of *Richardson* appearing to him to be sufficient to sustain the demurrer to that bill. The Lord Chief Baron, however, in the judgment, which is the subject of this appeal, holds that her Majesty cannot demur ; and his Lordship, after referring to a great number of cases, seems to infer from them, that where an action is brought by agents, the principal may, and has a right to be made a party to a bill of discovery. His Lordship was properly very cautious in laying down a general rule, for which there certainly is neither principle nor authority. He states the main points of the case of *Few v. Guppy* (g), in which the defendant to an action at law filed a bill of discovery against the plaintiff at law, who, in his answer, referred to certain documents. A motion made for the production of those documents was refused by the Vice-Chancellor, on the ground that the defendant, being a trustee of the documents for the benefit of persons who were not parties to the suit, ought not to be compelled to produce them in their absence. Lord Chancellor *Lyndhurst*, on appeal, ordered production ; declaring, at the same time, that the *custui que* trusts could not be made parties to the bill of discovery, as they were not parties to the action. It was somewhat surprising that Lord *Abinger* did not pay more attention to that declaration of Lord *Lyndhurst*, or to the declarations of the Master of the Rolls to the same effect in *Glyn v. Soares*. It appears from the general practice of Courts

(g) 1 Younge & C. 670 ; Hare on Discov. 124.

of Equity, and from the *dicta* of eminent Judges, that in no case can a bill of discovery be maintained against a party whose name is not on the record of the action at law. The practice which has prevailed, in underwriting cases, of making the assured parties defendants to a bill, when the action is brought in the name of the broker, supposing such practice to have been originally well founded, depends upon the peculiarities of those particular actions, and is not to be relied upon as furnishing general rules. When or how that practice originated, it is impossible to ascertain; it is certainly opposed to general principles, and there is no case to be found in which the point was discussed. —[Lord *Lyndhurst*: It would be curious to inquire into that practice.]—It might have arisen from the desire of the Courts of Equity to prevent multiplicity of suits, as bills of discovery have for their object to restrain actions at law, which the broker and the assured might respectively maintain; and the latter could not be restrained unless made a defendant to the bill of discovery, although he might not be a party to the broker's action, his name only being, by the Act 19 *Geo.* 2, c. 27, required to be on the record. The exception from the general practice, however, is confined to underwriting cases, and ought not to be extended. Bills of discovery generally stand on peculiar grounds, and have this further distinction from bills for relief, that a person who may be a witness cannot be joined in a bill of discovery, though he may in a bill for relief; *Fenton v. Hughes* (*h*), *Dummer v. The Corporation of Chippenham* (*i*). If the Queen of Portugal were in this country, the Respondents might

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(*h*) 7 Ves. 287.

(*i*) 14 Ves. 252.

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certainly put her into the witness-box as a witness in the action against them.

The cases of *Balch v. Wastall* (*k*), *Wych v. Meal* (*l*), *Moodalay v. Morton* (*m*), and *Angerstein v. Wentworth* (*n*), cited by Lord *Abinger* in his judgment, do not support it; while all the other cases referred to are directly opposed to it. The case of *The Bishop of London v. Fytche* (*o*), was supposed to be an exception to the general rule, but it has been found, on investigation of that case in the Registrar's book, that the clerk was not a defendant to the bill. That case, therefore, as well as the observations of Lord *Eldon* in *Fenton v. Hughes*, of Lord *Lyndhurst* in *Guppy v. Few*, and of the late Lord Chancellor, when he was Master of the Rolls, in *Glyn v. Soares*, are all opposed to the Lord Chief Baron's decision in this case.

On the supposition that the demurrer will be sustained on the first ground, it is unnecessary to urge the second, as to the materiality of the discovery sought by the bill. It is not denied by the bill that the Respondents received the value of the bills of exchange accepted by them, but they say the money so received was for the use of Don *Miguel's* government; and the bill contains numerous allegations on that head. But it is not material to the question here to inquire into the rights of Don *Miguel* or Donna *Maria* to the throne of *Portugal*; the maxim being, that the recognised government for the time being is the lawful government. In *Glyn v. Soares* (*p*), the Master of the Rolls truly observes, "that all the statements in the bill about the contest for the throne and

(*k*) 1 P. Wms. 445.

(*l*) 3 P. Wms. 310.

(*m*) 1 Bro. C. C. 496.

(*n*) 1 Fowl. 227.

(*o*) 1 Bro. C. C. 96.

(*p*) 3 Myl. & K. 468-9.

crown of *Portugal* must be, in any view of the case, wholly immaterial. The Courts of this country know nothing of the contests of foreign powers, as to who is or who is not to be sovereign of a foreign state. The Courts only know those who are from time to time recognised by this country as sovereigns. There has been no recognition in this country, nor is it so stated in this bill, of the individual Don *Miguel* as sovereign of *Portugal*; (He was acknowledged as regent during the Queen's minority); and yet the whole equity attempted to be raised in the bill is as to whether Don *Miguel* is or is not to be considered the sovereign of *Portugal*. All the statements on the face of this bill are utterly immaterial with reference to the only matter at issue in the action. It is a case, therefore, in which we cannot but suspect that some irregular and collateral advantage was expected to be derived from making the Queen of *Portugal* a party to this record."

The next ground of demurrer is, that a foreign sovereign, who does not voluntarily submit to the jurisdiction of our Courts, cannot be brought before them by any yet known form of process. According to that principle, the Queen of *Portugal*, a sovereign power, not being a party suing in the action at law, has not submitted to the jurisdiction of the Court of Exchequer, and cannot be made amenable to the process of that Court. The bill does not show that she has any legal title to a beneficial interest in the bills of exchange—the subject of the action—or in the proceeds of them. The bill alleges that she has an interest, but the facts stated do not support that allegation. Neither does it appear by the bill that *Soares* is her agent. The joinder of both as parties in this suit is forbidden by all

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the principles of pleading. As far as the facts relative to the indorsement of the bills of exchange to *Soares* are well pleaded, they show that *Soares* is the legal indorsee of the true owner; and as such, as against the acceptors, is solely entitled to recover the value of them.

Mr. *Knight* and Mr. *J. Russell*, for the Respondents:—It must be admitted on all sides that this is a most dishonest defence set up by her Most Faithful Majesty, who has not a shadow of right to the proceeds of these bills. They were never indorsed to her, and if they were indorsed to the other defendant, it was by compulsion and duress. Is it not the essential to the Respondents' defence to the action brought on these bills, that there should be a complete discovery of the matters and documents stated in the bill, and of which it prays discovery? It is idle to say that the Queen of *Portugal's* answer to these inquiries would not be material to the defence of her agent's action. There are cases from a remote period, showing that where a party brings an action in his own name, but in reality for another person, the answer, the admissions and declarations of the latter, are evidence for the defendant to the action; *Hanson v. Parker* (q), *Bauerman v. Radenius* (r), *The King v. The Inhabitants of Hardwick* (s), *Bell v. Ansley* (t), *The King v. The Inhabitants of Whitley Lower* (u), *Smith v. Lyon* (v), and *Dowden v. Fowle* (w). If, then, as appears from those cases, and others cited in *Phillips's* book on Evidence (x), in illustration of the rule that

(q) 1 Wils. 257.
 (r) 7 T. Rep. 663.
 (s) 11 East, 573.
 (t) 16 East, 143.

(u) 1 M. & S. 636.
 (v) 3 Campb. 465.
 (w) 4 Campb. 38.
 (x) Vol. i. p. 90. (7th ed.)

“ admissions are evidence in favour of the other side, whether made by the real party on the record, or by the party who is really interested in the suit, though not named on the record,” any answer of the Appellant would be admissible for the Respondents in their defence to the action, where is the rule or authority preventing them from filing a bill for the purpose of obtaining her answer? The right to institute a suit in our Courts against a foreign sovereign has never been questioned; *King of Spain v. Hullett* (a). There is no more privilege for a foreign sovereign than for his subjects. Any foreigner may be made a party to a suit here, if he has an interest in the subject of it. It is another question whether process can be enforced against a person residing out of the jurisdiction. If *Soares* had honestly answered that he had no interest in the bills, there would be an end of this suit. Then the action should be brought, if brought at all, in the name of the Appellant. But there is no rule or case against filing a bill of discovery in aid of a defence to an action against a person who is not a party to the action. Lord *Redesdale*, in his Treatise on Equity Pleadings, enumerates (z) ten different ways in which the interference of Courts of Equity is to be exercised: “ 2. Where the Courts of ordinary jurisdiction are made instruments of injustice. 3. Where the principles of law by which the ordinary Courts are guided give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent; and it may be collected that Courts of Equity, without deciding on the rights of parties, administer

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(y) 1 Clark & F. 333.

(z) P. 111. (4th ed.)

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to the ends of justice by assuming a jurisdiction; and further, "9. That Courts of Equity, without pronouncing any judgment which may affect the rights of parties, extend their jurisdiction to compel a discovery, or obtain evidence which may assist the decision of other Courts." And again, in a subsequent part (a), he repeats the 9th object of the Court's interference thus: "To administer to the ends of justice, without pronouncing any judgment which may affect any rights, the Courts of Equity in many cases compel a discovery which may enable other Courts to decide on the subject." The present case is within the scope of this description of the objects of Courts of Equity, whose duty it would be, if no precedent existed for this bill, to make one, as Lord *Talbot* did in the case of *Wych v. Meal* (b), saying, "This is a thing of consequence, which I do not remember to have been ever judicially determined; but so far is plain, that the plaintiff is entitled to, and ought to have, a discovery of the matters charged in the bill." But there are precedents: in actions in policies of insurance, a bill of discovery may be filed against the person really interested, though not a party to the action; and these cases are not exceptions to any rule, for it is the duty of Courts of Equity to interfere for the prevention of injustice in the Courts of Law, according to the particular circumstances of each case. Lord *Eldon's* reasoning in *Fenton v. Hughes* (c) shows that there was no general rule; for if there was, he would not fail to notice it, and so dispose of the case. The decision in that case is not questioned here; it lays down no new rule, but holds to the established practice that *Bate*, being no more than a witness,

(a) P. 148.

(b) 3 P. Wms. 311.

(c) 7 Ves. 288.

ought not to be made a defendant to the bill. No such rule of pleading as is now alleged was mentioned in the cases of *Curtwright v. Green* (*d*) and the *Corporation of London v. Levy* (*e*), and they have no bearing on this case. Clearly neither Lord *Eldon* nor Lord *Redesdale* was aware of this rule. The mention of such a rule is nowhere found, except in Mr. *Hare's* statement of Lord *Lyndhurst's* observations in *Few v. Guppy*; and the expressions there ascribed to his Lordship, if they were used by him, were certainly not called for by the case before him. There are many cases besides those of underwriters, in which bills of discovery may be filed against the parties substantially interested, although they sue and are sued by some public officer; such as corporations, joint-stock companies, and commissioners of roads or other public works; and in a recent case, such a bill was sustained against a landlord, in a suit for tithes against his tenants; *Day v. Drake* (*f*). A similar practice prevails in ejectment causes; and in bills against assignees, discovery may be prayed against the bankrupt. It was urged that the Queen of *Portugal* may be examined as a witness in the cause, and therefore the cases referred to forbid the making her a defendant to a bill of discovery. But it is not so clear that even if she were in this country she could be examined; being a party interested, she could not be compelled to give evidence against herself; *Fenn v. Granger* (*g*), *The King v. The Inhabitants of Woburn* (*h*). And to send a commission to examine witnesses in *Portugal* would be useless, as the Appellant would not only refuse to be examined her-

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(*d*) 8 Ves. 405.

(*e*) Id, 398.

(*f*) 3 Sim. 64.

(*g*) 3 Campb. 177.

(*h*) 10 East, 395.

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self, but would also prevent the execution of the commission altogether. The action is brought by her agent here ; she has the whole interest in the subject she has such important documents in her possession. and such knowledge of the matter, as that disclosure by her would make a complete defence to the action . She cannot be examined here or abroad against her interest ; unless, therefore, effect is given to the prayer of discovery in this bill, there must be a complete failure of justice. The case of the Respondents rests on these three points : 1st, That without a complete discovery of the matters as to which discovery and commissions to examine witnesses are prayed by their bill, and of the documents mentioned in the bill, the questions raised in the action against them cannot be fairly tried. 2dly, That they cannot have such complete discovery and such production of documents as they are entitled to, unless the Appellant be made a defendant to their suit ; and, 3dly, That according to the principles and practice of our Courts of Equity, they are entitled to make her a defendant, and to have from her all the discovery which the bill prays.

Mr. *Pemberton*, in reply :—There is no authority for the position laid down on behalf of the Respondents, that a party who has an interest in the subject-matter of an action, may be made a defendant to a bill of discovery in aid of the defence to the action, if not a party to the record. The passages referred to in Lord *Redesdale's* work do not sustain that position ; neither do the cases of *Cartwright v. Green*, and *Day v. Drake*. Except insurance cases, there is no instance of a bill of discovery in aid of a defence to an action, against a person who is not a party to the action. If the rule

was not strictly so, there would be innumerable instances of such bills. The decisions and observations of the Lord Chancellor, when Master of the Rolls, in *Glyn v. Soares*, put an end to the Respondents' case on this appeal, both upon the practice of our Courts of Equity and upon the merits of the case. Messrs. *Glyn*, or their principal Mr. *Richardson*, received the value of the bills of exchange to which they have no more right than the Queen of *Portugal*. She is required to answer the various allegations in their bill as to transactions which occurred in her childhood, and of which she cannot have any knowledge. It was absurd to make her a party to the bill, if she was not made a party for the sole purpose of delay; she did not appeal from the order for making service of subpoena on *Soares* good service on her, because she had not appeared to the bill, and could not have appealed.

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The Lord *Chancellor*:—As this case raises questions of great importance as to the practice of Courts of Equity, your Lordships will agree with me to postpone it for consideration.

Lords *Wynford* and *Brougham* concurred.

The Lord *Chancellor*:—My Lords, this case comes before us on a demurrer to a bill of discovery, filed by the Respondents, who were the acceptors of certain bills of exchange. The holders of those bills having brought an action on them, a bill of discovery was filed, which undoubtedly the defendants to the action had a right to file against those who were pursuing them at law; but in addition to those who were pur-

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suing them at law, they made another person, the Queen of *Portugal*, a party defendant to their bill. How the Queen of *Portugal* became a party to the cause in the Court below, and what immediate process was served upon her, is not now under our consideration: she was, by virtue of certain orders, which have not been the subject of appeal, made a party by substituted service; and it became necessary, therefore, for those who had to protect the interests of that foreign potentate to take such proceedings as became necessary in consequence of the orders of the Court of Exchequer. The Queen of *Portugal* demurred to the bill of discovery, and that demurrer was argued before the Chief Baron of the Court of Exchequer, and overruled. From the order overruling the demurrer, an appeal was brought to this House. Unfortunately a considerable length of time has elapsed since this appeal was argued; but I only refer to that, to guard against any supposition that the delay has arisen from any doubt being entertained, at least by me, of the proper judgment to be pronounced.

The plaintiffs in equity, the acceptors of the bill of exchange, state that they are merely acting as bankers; and there is no reason to suppose that they have any benefit in the subject-matter. But looking at the case as it affects the commercial interests of the country, one cannot fail to observe that, as they are acceptors of certain bills of exchange, of which the plaintiff at law is the holder; if that which has been done by the Court of Exchequer in overruling this demurrer, is to be considered the law of the land, one does not see how any holder of bills of exchange can ever hereafter compel the acceptor to pay: because, if the acceptor could make any foreign

potentate a party defendant to a bill of discovery, the plaintiff-at-law will not be at liberty to proceed until that foreign potentate puts in an answer to that bill. It is plain that in such a state of things the holder of the bills of exchange will encounter difficulties which it is not very advisable to permit.

The bill states that the party suing at law, the holder of the bills of exchange, is the mere agent for the Queen of *Portugal*; and upon a demurrer, that statement, of course, must be taken as an allegation founded in truth. The bill therefore raises the question which has been decided in the Court of Exchequer, and the proposition there laid down appears to me very fairly to state the point which your Lordships have now to decide. It was laid down by the Lord Chief Baron that, in his opinion, where a party interested is charged in a bill of discovery and called upon to disclose, he is bound to do so, and that a Court of Equity will compel him to do so, although he is not a party to the record at law: those are the terms in which the proposition is laid down. Now I have the misfortune to differ from the proposition so laid down, and I think your Lordships will be of opinion, on reference to the authorities, that the rule of Courts of Equity is precisely the reverse. This decision in the Court of Exchequer, which we are now considering, has given rise to several cases in Chancery, which have made it my duty to consider the subject; and although it is one as to which, during an experience of more than 35 years in the Court of Chancery, I have not entertained any doubt, or ever heard any suggested, I have thought it my duty to examine all the cases upon the subject; and I propose, as shortly as possible, to submit to your Lordships the result of that examination.

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The question is, whether a bill of discovery can be supported against persons interested in the subject of the action at law, but not parties to the record? Bills of discovery in aid of the defence to an action are permitted for the purpose of obtaining from the antagonist at law the discovery of matter, which, being admitted by him, may aid the defence; and not for the purpose of procuring evidence. It is now nearly 40 years since Lord *Eldon*, in *Fenton v. Hughes* (*k*), allowed the demurrer of the defendant, *Bate*, to a bill of discovery, which (according to the statement of the bill by the present Vice-Chancellor in *Irving v. Thompson* (*l*)) alleged that he, *Bate*, was interested in the success of the action, and was to be entitled to all or some part of the money to be recovered thereby, and that he would be liable to pay all or some part of the costs, in case *Hughes*, the plaintiff in the action, should not recover. Lord *Eldon* observed that *Bate* could not be a witness for the plaintiff at law, on account of his interest, but that the defendant might examine him, and, that the superior advantages of discovery by answer, particularly as to the production of papers, was not sufficient to make an exception to the rule that a bill of discovery will not lie against a mere witness.

In 1803, in the case of *The Mayor of London v. Levy* (*m*), and in 1808, in *Le Texier v. The Margravine of Anspach* (*n*), Lord *Eldon* laid down the rule in the same way. In 1813, Sir *Thomas Plumer* acted upon this rule in *Powell v. Yeatts* (as stated by the Vice-Chancellor in *Irving v. Thompson*), as he did in the same year in *Whitworth v. Davis* (*o*). Lord *Lyndhurst*, in

(*k*) 7 Ves. 287.
 (*l*) 9 Sim. 23.
 (*m*) 8 Ves. 403.

(*n*) 15 Ves. 164.
 (*o*) 1 Ves. & B. 550.

Tooth v. The Dean and Chapter of Canterbury (*p*), and in *Few v. Guppy* (*q*), on appeals from the Vice-Chancellor, recognised and acted upon the case of *Fenton v. Hughes*. In 1835, in the case of *Glyn v. Soares* (*r*), at the Rolls, I considered the rule as clearly settled; and in 1839, the Vice-Chancellor, in *Irving v. Thompson*, reviewed all the cases and acted upon the rule; and in the present year, in the case of *Kerr v. Rew* (*s*), I thought myself bound by the pendency of this case to look into all the authorities, and I found no ground for doubting the rule as I had always understood it; and therefore I allowed a demurrer by a party made a defendant to a bill of discovery by underwriters, upon an allegation that an action upon a policy brought in the name of another as agent, was in fact brought for the benefit of the party demurring, and that he was exclusively interested in the subject-matter of the suit.

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It was indeed assumed in the Court below, that in cases of actions upon policies, it was the common practice to make the owners defendants to bills of discovery, although they are not parties to the record at law. What may have been the recent practice of the Exchequer I am not very conversant with; but I am very confident that if there be any such practice in that Court, it is of very recent date, and certainly at variance with the practice of the Court of Chancery, as the cases of *Irving v. Thompson*, and *Kerr v. Rew*, prove. At the time when I was familiar with what was going on in the Court of Exchequer, it was not usual to file bills of discovery in such cases; they all prayed relief. I have looked through many precedents, which, from the names attached to them, must cover a period not

(*p*) 3 Sim. 63.

(*r*) 3 Myl. & K. 450.

(*q*) Hare on Discov. 124.

(*s*) 9 L. Jour. N. S. 148.

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much short of a century, and I find but one which does not pray relief. The case of *Vandam v. Munro* (t), as reported, would appear to have been a bill of discovery, and if so, it would be an instance of a bill of discovery filed against the assured, not parties to the action; but considering what the general practice was, it was most probably a bill praying relief. Some cases, however, were referred to by the Lord Chief Baron as establishing a contrary doctrine, and some observations of Lord *Hardwicke* in *Plummer v. May* (u) were relied upon: but it is obvious that the bill in that case prayed relief, Lord *Hardwicke* saying that there were charges in it which, if proved, would entitle the plaintiff to a decree against the defendant for an account. *The Bishop of London v. Fytche* (x) was also relied upon as an instance in which a bill of discovery was filed against a defendant who was not a party to the action. I have had the Registrar's book searched, and it appears under date of the 13th of June 1780, at folio 506 of that book, that the report in *Broome* in that respect is erroneous, and that *Eyre*, the clerk, was not a party to the bill of discovery. *Dummer v. The Corporation of Chippenham* (y) has also been referred to, but Lord *Eldon's* observations (z) on it showed that in his opinion the principle of permitting a plaintiff in a suit against a corporation to seek discovery from an officer of the corporation might be extended to individual members. *Batch v. Wastall* (a) appears to be a bill for relief and not for discovery only, and the object was to make assets in the hands of the defendant liable to the plaintiff's judgment. The cases of officers of corporations stand on princi

(t) 2 Anst. 502.

(u) 1 Ves. 426.

(x) 1 Bro. C. C. 95.

(y) 14 Ves. 245.

(z) Id. p. 253.

(a) 1 P. Wms. 245.

ples entirely peculiar to themselves, and have obviously no application to the present case. *Angerstein v. Wentworth* (b) does not prove much, but as far as it goes, it is an authority in favour of the demurrer.

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Thus all the cases which have been supposed to support the doctrine upon which the judgment of the Court below proceeded, when examined into, are proved to want those circumstances which, from the mistake of the Reporters, have been supposed to make them authorities for that purpose. A proposition was suggested which is, I believe, quite new; namely, that a bill of discovery may be filed against any one whose admissions may be used for the defendant at law. This proposition I conceive to be wholly untenable; and what affords the most certain answer to it is, that in *Fenton v. Hughes* (c), the declarations of *Bate* (assuming the facts to be as stated in the bill and admitted by the demurrer) would have been admissible in favour of the plaintiff in the bill of discovery. It is true that examining a person as a witness, who has important papers in his possession, is far less effectual than obtaining his answer to a bill of discovery; but this was fully considered by Lord *Eldon* in *Fenton v. Hughes*, and yet he held that this consideration, though well founded in fact, did not justify the filing of a bill against a person who might be examined as a witness. The demurring party might in this case be examined as a witness for the plaintiffs to the bill of discovery, the defendants at law; as may the assured, not a party to the record, for the underwriter, as stated by Lord *Abinger* in his judgment on this case. The case of the lessor of the plaintiff in ejectment

(b) 1 Fowl. 227.

(c) 7 Ves. 287.

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being compelled to answer a bill of discovery is no authority against the rule, for he is considered in all respects as a party to the record, which the assured is not, and accordingly may be examined as a witness; and therefore, if your Lordships were to sanction the principle upon which the judgment of the Court below has proceeded, a very mischievous innovation would be made in the rules and practice of Courts of Equity as to compelling discovery; and an inquisitorial power would be established, by which persons not parties to any litigation, might be compelled, in a contest between others, to discover the secrets of their own affairs, upon an allegation, which could not perhaps be denied, that they had some interest in the subject-matter of a litigation between others; and as, if the defendant at law be entitled to the discovery in aid of his defence, the action cannot be permitted to proceed till such discovery be obtained, an easy expedient would be afforded of defeating the enforcement of legal rights by action at law, by filing bills of discovery against persons not parties to the record and out of the jurisdiction, upon an allegation of their being interested in the subject-matter of the action. Of the possibility of such an abuse the present case furnishes a striking example. The rules of Courts of Equity, as they have hitherto existed, cannot lead to such an abuse; and I trust that your Lordships will maintain those rules, and thereby prevent the recurrence of such injustice in future. I therefore move that the judgment of the Court below be reversed, and the demurrer allowed.

Lord *Lyndhurst*:—It is unnecessary for me to go through the cases which have been referred to; it is sufficient for me to say that I entirely concur in the

opinion which has been now pronounced upon this case. I consider the decision in *Fenton v. Hughes* as a decision precisely in point upon the present occasion. It was suggested that *Bate* had no interest; but the record has been searched and the Registrar's notes of the case have been examined, and it appears that he had a direct interest; that it was so asserted upon the record that *Bate* was to share a part of the money that was to be recovered; and was liable, or undertook, to pay the whole or part of the costs. The decision in that case has been acted upon from the time when it was decided to the present time. It was acted upon in two instances by Lord *Eldon*, who considered that case with great care and attention at the time. It has been confirmed by the case of *Powell v. Yeatts*, about which the Master of the Rolls, Sir *Thomas Plumer*, at first doubted; but when the facts of *Fenton v. Hughes* were distinctly brought to his attention he confirmed the judgment in that case, and acted upon it in the decision he pronounced in *Powell v. Yeatts*. The same point came before the Court during the time I held the Great Seal; I considered the law as settled by the case of *Fenton v. Hughes*, and acted upon it in the cases referred to (d). Since that time it has come before the Court in two or three instances during the time of the present Vice-Chancellor, who pronounced a most elaborate judgment in the case of *Irving v. Thompson* on this very point; the judgment being, I believe, the more elaborate in consequence of the decision from which this is an appeal. The decision which is now appealed from was founded on a misapprehension of the case of *Fenton v. Hughes* as to the facts of that case, and

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(d) *Tooth v. The Dean and Chapter of Canterbury*, and *Few v. Guppy*; *Hare on Discovery*, p. 124.

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there is undoubtedly something ambiguous and vague in the report, in consequence of which the Vice-Chancellor got the original brief containing the facts and containing the bill, in which the facts are such as my noble and learned friend has stated, and such as I have mentioned.

There was another case which has been relied upon, which was considered as an authority for the judgment in this case; I mean the case of *The Bishop of London v. Fytche*; that was founded upon the apprehension that *Eyre* was one of the defendants on that record, whereas, upon examining the record, it appears that *Fytche* was the only defendant. It appears to me that that is not an authority to oppose to the authority of *Fenton v. Hughes*. I repeat what I before said, that any person looking to the judgment of Lord *Eldon* in that case will see that he considered the case with his usual attention, and that in pronouncing the judgment he must be considered as pronouncing no new law, but that which had been even at that time considered as the rule of Court, as it has been ever since. I am therefore of opinion that the judgment ought to be reversed.

Lord *Brougham*:—Agreeing, as I do, with my noble and learned friends who have addressed your Lordships, I shall not trouble your Lordships further than by expressing my entire concurrence in the opinion expressed by them. I agree entirely as to the cause for postponing this judgment, which was principally for the purpose of having those cases looked into, upon which it was said that the judgment of the Court of Exchequer had been founded. The case of *Fenton v. Hughes* was a good deal commented upon at the bar in the course of the argument, as also the

case of *The Bishop of London v. Fytche*. There is no doubt that the errors which have prevailed in the reports of those cases, and the great vagueness of the report of the case of *Fenton v. Hughes*, have given rise to this decision in the Court of Exchequer. The manifest error in the case of *The Bishop of London v. Fytche*, and I think another error, which appears in the report of some third case, gave rise to considerable discussion and to some doubt at the hearing; and, according to my recollection, it was principally with a view of having this mistake and difference with respect to the cases examined, that the postponement of this judgment has taken place. It appears now very satisfactorily, from the full inquiry into all those cases in the late case of *Irving v. Thompson* before the Vice-Chancellor, that those cases have been either mistaken or misrepresented, and that from those circumstances the error in this judgment of the Court of Exchequer has arisen.

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Lord *Lyndhurst*:—I believe the third case to which my noble and learned friend alludes is not a single case, but I believe it is that class of decisions supposed to have existed in insurance cases. It would be desirable to ascertain whether those were bills of discovery or bills for relief. Upon examination it may turn out that the whole course of proceeding in those cases was not in the nature of bills for discovery but bills for relief; and I apprehend, therefore, what is supposed to be the modern practice arises from misapprehension of the form of those bills.

Lord *Wynford*:—I rise to address your Lordships with considerable reluctance, because I am bound to state to your Lordships that I agree in opinion with the

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noble and learned Judge who decided this case in the Court below, and I have the misfortune to differ from my noble and learned friends who have given their opinions upon this occasion. I never heard before of any of the cases referred to being misreported, except the case of *The Bishop of London v. Fytche*. It was certainly stated at the time of the hearing here of this case, that there was a mistake in that report, inasmuch as a person of the name of *Eyre*, who was supposed to have been a party in that suit, was not a party; but with respect to any mistake or misreport in the case of *Fenton v. Hughes*, I never heard of any—[Lord Brougham: I did not say that it was misreported, but that there was an uncertainty with respect to the facts of that case, which has since been cleared up.]—I was not aware that there was any uncertainty even as to the facts; and as the facts are stated in the report, which we had to refer to at the time this case was under consideration, it appeared to me then, as it appears now, that it was a very strong authority against the opinion which my noble and learned friend has this day pronounced.

Your Lordships are not in possession of any of the circumstances of this case, or you would at once perceive that grosser injustice never was worked in any cause than will be worked in this, if your Lordships pronounce the judgment which it is recommended to you to pronounce. It is fit that your Lordships should be put in possession of some of these facts, and should know how some of these facts have been dealt with in another country. I have been in the habit of thinking that our laws were the wisest in the world; that they were better administered in this than in any other country. I shall be bound to confess, after the judgment which I am afraid will be pronounced

in this case to-day, that they manage things better in *France*. While we have been sleeping over this cause they have in *France* got at the facts, and in *France* they have decided according to the justice of the cause. They have disposed of the Queen of *Portugal* and her agents in that country, as I hoped your Lordships would have been enabled in this country to dispose of her Majesty and of Mr. *Soares*, her agent in this country. My noble and learned friend on the woolsack has stated, that if your Lordships uphold the judgment of my noble and learned friend the Lord Chief Baron, commercial people, holders of bills of exchange, will be in a fearful situation, because it would only be necessary to make some prince in *Europe* or *America*—fortunately for the purpose of this cause, though unfortunately for other purposes, there is but one prince in *America* who can be made a party to any such cause—that, by making any foreign prince a party to the cause, the action may be tied up and no holder of a bill of exchange can ever recover upon it. There is a very short answer to that argument: How can that be done, when it is stated, as it is in this cause, that the Queen of *Portugal* is the sole party to the cause, and has the sole interest, and that Mr. *Soares*, the person whose name appears upon the record, is her agent; a fact which is admitted? Can it be said that, if you decide that such a person is bound to make a disclosure, you would be opening a door for the filing of bills, calling upon any sovereign of *Europe* or of *America* to answer to the bill? That allegation, I conceive, cannot be supported. I confess I am a little surprised that my noble and learned friend, who has so general and accurate a knowledge in matters of Equity, should have had recourse to such an argument as that which he has

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used. I found my observations in this cause upon this simple allegation, that the Queen of *Portugal*, who refuses to answer, is the sole person who can know anything of the facts; that the Queen of *Portugal*, who refuses to answer, is the sole person who has any interest in the cause; for my noble and learned friend has admitted that what is charged in this bill, if not denied, must be taken to be true. It is charged in the bill, and it is not denied, that Mr. *Soares* had admitted that he has no interest whatever in this cause; that the only party upon the record, who has the whole interest in this cause, is the Queen of *Portugal*, who refuses to make any disclosure; and by refusing to make any disclosure will obtain a sum of money from the merchants of this country, to which she has not the slightest pretence of right. A fouler fraud, if I may use such a word as applicable to parties in the situation in which these are; a fouler fraud was never committed upon the merchants of this country than will be committed if this judgment shall pass, as I am very much afraid it will pass.

What are the facts of the case? Some time about the year 1829 the government of *Portugal* was *de facto* in the hands of Don *Miguel*. He negotiated a loan with two persons in *France* of the names of *Outrequin* and *Jauge*, and bonds were given to those two persons, which bonds were to be delivered in the form of scrip to the different persons who contributed to that loan. The loan was to be raised by bills drawn upon persons in *England* and in *France*; bills exactly under the same circumstances with those in the present case. The decision in the Court of *France*, which has disposed of the Queen of *Portugal*, is a direct decision upon this very point now under consideration. Bills were to be given in satisfaction of raising this

loan, on merchants in *England* and *France*. The bills upon *England* were indorsed by a person of the name of *Conto*, then a member of the Court of *Portugal*; they were transmitted to this country, and were presented for acceptance to the present Respondents. Those bills were to be given to the person who was the indorsee of the second set of bills. At this time Don *Miguel* was *de facto* the governor of *Portugal*; by him this loan was raised: he was in the mean time dismissed from the throne of *Portugal*, turned out as an usurper, and Donna *Maria* was placed in his stead. The first act of Donna *Maria* was to repudiate the loan of Don *Miguel*. Perhaps she was right in that: she said that Don *Miguel* was an usurper, and therefore the bonds he had given and the loan he had raised were not binding upon the kingdom of *Portugal*, and would not be paid. So far she was right: but if it was right to say that the bonds were invalid, it was also right to remit the bills to those who had given them for the purpose of raising that loan. But although the loan was declared void, it was not thought proper by the council of *Portugal* to remit the bills. The council of *Portugal*, after Don *Miguel* had left that country, sent for Mr. *Conto*—who had been actually dismissed from his situation, to which he had been appointed by Don *Miguel*, and who never held any situation of that kind under Donna *Maria*—and he was compelled against his inclination, for he had some scruples of honesty about him, to indorse these bills to Mr. *Soares*, in order that *Soares* might recover the money for those bills in this country, and remit it to Donna *Maria*, who had repudiated the loan, and who had therefore no more pretension of right to touch those bills than any of your Lordships. Immediately upon this, Don *Miguel* gave notice to

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the acceptors of the bills not to pay them to *Soares*, and not to accept them on account of *Soares*. *Outrequin & Jauge* gave also the same notice not to pay the bills, because they said *Soares* was endeavouring to recover a sum of money for the Queen of *Portugal* which she had no right to, having repudiated the loan, and having declared that the bonds were void.

Now, under these circumstances, can any one allow, on any pretence, the Queen of *Portugal*, who is the real party in this cause, to recover in the action upon bills of exchange, the consideration of which she herself by her own act has repudiated? I state, and it cannot be denied, that it would be an act of gross injustice; and I should be very sorry if, in consequence of any supposed technical rules of Courts of Equity, your Lordships were to be made parties to such injustice. This is a case of so much importance, not only with respect to the parties, but with respect to the administration of justice in general, that I, for one, with all my respect for the Court of Chancery, would rather that it should be abolished, than that this cause should be decided in the manner in which it is proposed to be. If we cannot do better here than they do in *France*, if we cannot get at the facts and decide upon the justice of the case, but are tied up by these absurd forms, for which no reason has been attempted to be given by my noble and learned friends, it would be better that we should have no Court of Chancery at all than one so fettered.

[His Lordship, in answers to interlocutory observations from Lord *Lyndhurst*, observed: My noble and learned friend says, "They did not examine the Queen of *Portugal* in the proceedings in *France*, to which I referred." We do not propose to examine the Queen of *Portugal* here. I know we cannot examine her

here, but we can gain some information as to who the persons are who may be examined here. We may do that which is asked for by this bill; we may have a commission sent, not only to *Portugal* but to *France*, to examine the only persons who can know anything of the facts connected with the cause. My noble and learned friend again says, “We do not decide that a commission may not issue.” I know that; but who can issue that commission, unless the Queen of *Portugal* will, through some minister of hers, kindly inform us who are the persons to whom the commission is to be sent, and from whom the information is to be obtained? We are kept entirely in the dark upon this subject; and by keeping us so, the Queen of *Portugal* will get into her pocket money to which she has no more right than she has for taking the money of your Lordships.]

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But it is said there is a distinct rule in the Court of Chancery which prevents this being done. I am bound to suppose that there is such a rule, as my noble and learned friends have so stated it. And I am also bound to suppose that all the Reporters must be mistaken: but if the Reporters are not mistaken, there is no such rule in the Court of Chancery. If there is such a rule in any Court of Equity in this country, I beg to say that in a vast number of cases it is absolutely impossible that justice can be got at. Suppose a bill of exchange obtained in the most fraudulent manner, under circumstances of disgusting fraud, the man who gets hold of that bill will never bring an action on it himself; he will hand it over to some person; put an indorsement on it, get half a dozen indorsements put upon it, if in consequence of that he cannot be called upon to answer and disclose all the circumstances. I am aware that if you have all

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those indorsees, you may examine them as witnesses in the cause; but you cannot get at the man by whom the bill has been first passed, and whose name did not appear upon the back of the bill.

It is of very little use to get hold of any facts in Court, unless you have a knowledge of those facts beforehand, in order to use them advantageously at the time of the trial. My noble and learned friend has admitted that a bill of discovery is much better in many cases than the examination of a witness. In the examination of a witness the answers may come upon you by surprise, but by means of a bill of discovery you have the whole examination in your possession, and have an opportunity of thinking of it before it is used in Court; and you not only know how the information is to be used when it is obtained, but you find out the means by which other matters can be examined in a Court of Justice, which it is impossible you could know anything about or be aware of, if the parties were not to be called upon to give evidence upon them before they come to a Court of Justice.

I will take the liberty of stating that it does not appear to me that Lord *Redesdale*, one of the most eminent men who ever practised in a Court of Equity, was ever aware of any such rule as that which is now suggested. It is stated in his *Treatise on Pleading*, that a bill of discovery must state the matter touching which a discovery is sought, the interest of the plaintiff and defendant in the subject, and the right of the first to require the discovery from the other. Further, in the same book Lord *Redesdale* states that bills have been filed to impeach deeds on the ground of fraud. Now here, not only no such rule as this, which is relied upon in this case for the

purpose of defeating the merchants of *England*, and putting their money into the pocket of the Queen of *Portugal*, is advanced, but the direct contrary is stated by Lord *Redesdale*; for what he states is equivalent to that. He says, "Where bills have been filed to impeach deeds on the ground of fraud, attornies who have prepared the deed, and other persons, have been made defendants for the purpose of obtaining a full discovery (*d*)."
Those were bills of mere discovery, and in such bills attornies, who cannot be parties to the cause, and other persons, certainly not meaning other parties to the cause, may be made witnesses for the purpose of getting at a full disclosure of the fraud, or anything of that nature. If you are to be tied down to an examination merely of persons whose names are upon the record, I am sure, in ninety-nine cases out of a hundred, frauds will escape, as fraud of the grossest kind will unquestionably escape in the case now under discussion. Lord *Redesdale* says, in another passage of his Treatise, "As the object of the Court in compelling a discovery is either to enable itself or some other Court to decide on matters in dispute between the parties, the discovery sought must be material either to the relief prayed by the bill, or to some other suit actually instituted, or capable of being instituted (*e*)."
Now I should think your Lordships will admit that this light never broke in upon Lord *Redesdale*, or he would not have written that part of his Treatise respecting bills of discovery, if such a rule had occurred to him. His book is the best I can find, and is the admitted text-book on this subject.

Your Lordships will find that in the case of *Wych v. Meal* (*f*), Lord *Talbot* ordered the secretary of the

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(*d*) Mitf. Pleadings, 191.
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(*e*) Id.
L L

(*f*) 3 P. Wms. 310.

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East India Company to put in an answer, because the Company would not answer on oath: and he said, though the answer might not be read against the Company, yet it might be of use to direct the plaintiff how to draw his interrogatories. There is not a word said by Lord *Talbot* in that case applicable to this distinction; and we do not look into cases merely to find exactly the same facts, or to find parties exactly under the same circumstances; but we look into cases to discover general principles. I say this case establishes the principle laid down by Lord *Redesdale*, that the Court will grant a discovery where it is necessary for the purposes of justice, the parties seeking it having an interest in obtaining it from the party for whom it is sought. My noble and learned friends have mentioned this case of the secretary of the *East India* Company, but have not, upon principle, attempted to distinguish it from the present case. The secretary to the *East India* Company was no party to the record, but he was examined in the cause, because the parties to the cause could not be compelled to make a disclosure upon oath. If the Queen of *Portugal* cannot be made a party, and cannot be obliged to make a discovery, or to state who her officers are, or give us any means by which we can find out the circumstances under which she obtained these bills, or afford us any opportunity whatever of investigating the transaction; if she can get this money into her hands, allowing the record of the Court of Equity in this country to charge her without denial on her part, that will occasion one of the grossest frauds that was ever committed in any country.

I do not recollect whether any objection was made to the accuracy of the report of *Plummer v. May*. A bill was filed in that case by an heir-at-law against

witnesses. The demurrer put in by one of them was overruled on the ground that the demurrer admitted everything that was well pleaded ; and there was an express allegation in the bill that the defendant pretended to some right or interest under the will. The Queen of *Portugal* stands in a very different situation from the witnesses : she not only has an interest in the subject of this suit, but she has the whole and entire interest, and all which is now doing is doing for her. If my noble and learned friends can prevail upon your Lordships to overturn this judgment, the Queen of *Portugal* will obtain this money, which otherwise she will never get.

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With respect to the case of *Fenton v. Hughes*, it is said that the judgment in that case is now discovered not to have been given on the grounds stated in the report of it by *Vesey* ; but of that I know nothing. It appears that an action *qui tam*, brought in the name of the defendant *Hughes*, at the instance of *Bate*, was the foundation of a bill with prayer of discovery, and against both defendants, and that the plaintiff might have the benefit of such discovery at the trial of the action. That does not look like a bill brought for relief, but for the purpose of obtaining facts to be used in defence to an action at law, commenced in the name of the defendant *Hughes* only, and not *Hughes* and *Bate*. *Bate* demurred to the bill, on the ground that the plaintiff had not shown any right to call upon him in equity for discovery, and that he might be examined as a witness. The demurrer was allowed ; on what ground ? On the ground that *Bate* was a mere witness, having no interest. It was decided upon that ground according to the report, and I suppose that to be an accurate report. It must be a very inaccurate one if that is not the case ; there is in

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that report no notice taken of his not being a party in the cause. If this rule now alleged be the rule of Courts of Equity, would not Lord *Eldon*, who, we know, had a short way of disposing of causes without going through all the points, have said at once, "You cannot go on here; *Bate* is no party to the cause; there is an end of it." But Lord *Eldon* goes into the whole case, and decides it upon the ground that the party who called upon *Bate* had no interest.

The case to which I am now about to allude is the decision of the noble and learned Judge whose judgment is under review, in this very case. I think that every word of it is entitled to attention, not only from the great authority of that noble and learned Judge, as regards matters of law, but also because, though he has not had so much experience in Courts of Equity as my noble and learned friends now present have had, yet he has heard more of what passes in causes in general than almost any man in the country, and certainly was one of the most distinguished advocates ever at the bar. Although he has not attended so much to the Courts of Equity, he has been called upon in the Courts of Common Law to attend to pleadings and answers in Courts of Equity. Lord *Abinger*, giving judgment in this case, says, "The question is, whether a party suing is agent for another." That is the very point, which has not been yet touched upon here. In this case *Soares* is the agent for the Queen of *Portugal*: *qui facit per alium, facit per se*: what the Queen of *Portugal* does by her agent, she does by herself, though her name is not upon the record. The name of *Soares* is upon the record in no other way than as agent for the Queen of *Portugal*. It would appear ridiculous to say, you shall not put the Queen of *Portugal* to answer, because her name

does not appear upon the record ; though it is admitted that the person whose name did appear had no interest in the concern, and that her Majesty was solely interested. Lord *Abinger*, after observing that *Soares*, proceeding in his own name, but really on behalf of the Queen of *Portugal*, ought to be restrained in his action, until the party for whom he acts puts in her answer to the bill of discovery, goes on to say, “ Why not apply that principle to an action brought on a bill of exchange, or other security ? ” I also say, why not ? Is it possible, on principle, to distinguish these cases ? It is known that most of the persons required to answer bills are not parties to the records in the actions ; but they are the persons who can give the best information, and therefore they are required to give that information. That is the rule of common sense, and I trust it will not be prevented from operating by the technical rules of the Court of Chancery, even if I were obliged to confess, which I do not, that the authorities were all decidedly against me.

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There is another case which I ought to mention, decided by my noble and learned friend on the woolsack ; the case of *Glyn v. Soares (g)*. I find this passage in the judgment : “ The acceptors have an undoubted right to have that fact ascertained ; namely, whether the party holding the bills is or is not the person who derived title under the individual or the officer to whose order the bills were made payable ; because upon the affirmative of that fact depends their authority to pay the bills which they have accepted, &c. ; but beyond that they have no interest in the subject-matter. It cannot be material to them how Messrs.

(g) 3 Myl. & K. 466.

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Outrequin & Jauge had the money in **their hands**; why it was they wished to remit it to *Portugal*, &c. This is not a bill for the purpose of administering equities between the parties; it is not a bill in which the question, who is entitled to the money, can be discussed; it is merely a bill to aid the defence of an action at law, and it cannot correctly or properly raise any question which is not material for that purpose." I entirely concur in these observations; you cannot go into any question which is not material for the purpose for which the bill is filed; that is, to get at evidence which is shown to be material for the purpose of defeating an action unjustly brought against the person who filed the bill.

On these grounds I feel it to be my duty to support the judgment which my noble and learned friend the Chief Baron has pronounced in this case; and after having heard the opinions which my noble and learned friends have stated to your Lordships, I take them to proceed upon a mere technical ground, for which there is no pretence in my humble judgment; and if that which they have expressed is declared to be the law, if I continue my attendance in Parliament, I shall bring in a bill to try whether I can prevail on the House to get rid of a law which must be pregnant with so much mischief, and which will tend to inflict so much injury upon the country. I have felt this a very painful duty; I have stated the judgment which in my opinion you ought to give; and feeling decided in my opinion, I could not reconcile it to my conscience not to come here and to state to your Lordships that I enter my protest against the decision about to be made.

Lord *Brougham*:—I did not say that *Fenton v.*

Hughes was reported upon other grounds than those upon which the judgment was pronounced, and which were stated by the Vice-Chancellor in *Irving v. Thompson*. What I said was, that there was some vagueness on the part of the Reporter, which had misled the Court below: it is quite clear, by what the Vice-Chancellor says in *Irving v. Thompson*, that the Lord Chief Baron was misled respecting the grounds of the decision in *Fenton v. Hughes*.—[His Lordship, to show that there was a mistake, read passages from the judgments of both the learned Judges.]

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Lord *Lyndhurst* :—If the report is looked at, it will not be found inconsistent with that which is stated to be the effect of it. I have looked at *Fenton v. Hughes*, and it is not at all inconsistent.

The *Lord Chancellor* :—The allegations in *Fenton v. Hughes* are as nearly as possible the allegations in this cause. It is alleged that *Bate* was the party really interested; that the person suing was not suing for his own benefit; and that the absent party, *Bate*, was so much interested in the result of the suit, that he was to pay the costs. I say nothing about what may be the ultimate decree of the Court in this case. My noble and learned friend seems to suppose that I apply the decision on this point to the facts of the case. Now it is a rule in Equity, that when a case comes on upon demurrer, we must take the facts as stated, for the purpose of the demurrer. We know nothing of the truth of the facts in the bill; it may be a mere fiction, a mere fable. It will lie upon the parties to prove these facts respecting Don *Miguel* or Donna *Maria*; we must take the facts as stated on the bill, for the purpose of trying the demurrer; but for no

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other purpose. I do not mean to say that the facts may not be those stated by my noble and learned friend; for we really have not the facts before us in any shape; we must try the demurrer upon the facts as alleged in the bill, without regard to any other point.

Lord *Wynford* :—I conceive the principle which the Courts have adopted is this : that the Court says, “ Unless you condescend to answer the bill, you shall not go on with the action;” *Hullett v. The King of Spain*.

The *Lord Chancellor* :—That was a bill for relief. My noble and learned friend has not distinguished very happily between bills for relief and bills for discovery, which is a very important distinction : this is a mere bill of discovery.

It was then ordered, that the order complained of in the appeal be reversed, and that the demurrer be allowed.

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ANOTHER appeal by the Queen of *Portugal* against an order of the Court of Exchequer made on the 9th of *February* 1836, overruling her Majesty’s demurrer to a similar bill of discovery filed by Messrs. *Gowers* against *Soares* and her Majesty, came to be heard on the 6th of *August*, when counsel appeared for her Majesty and opened the appeal, but no counsel appeared for the Messrs. *Gowers*, nor had they put in their answer to the appeal. The order of the Court of Exchequer was reversed, and it was ordered that the demurrer should be allowed.

SIR FELIX BOOTH, Bart., and the other
Directors of the *London* JOINT STOCK
BANK, and GEORGE POLLARD, the
Manager of that Bank - - - } *Appellants.*

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The Governor and Company of the
BANK of ENGLAND - - - } *Respondents.*

A PARTNERSHIP consisting of more than six persons, carrying on the business of bankers in or within 65 miles of *London*, cannot, without violating the Acts of Parliament respecting the Bank of *England*, accept, in the course of such business, a bill of exchange payable at less than six months from the time of acceptance.

*Bank
of England—
its exclusive
Privileges.
Acts of
Parliament—
Construction.*

Whatever is prohibited by law to be done directly, cannot legally be effected by an indirect and circuitous contrivance.

A *London* Joint Stock Bank, consisting of more than six partners, entered into an agreement with a bank in *Canada*, that G. P., manager of the *London* Joint Stock Bank, but not a partner therein, should accept bills drawn on him by the *Canada* bank, payable at less than six months from the acceptance thereof; and that the *London* Joint Stock Bank should provide funds for the due payment of such bills; the money transactions arising thereupon being, in the accounts between the two banks, to be treated as transactions between the said banks.—HELD by the Lords (affirming the judgment of the Master of the Rolls),—

1. That the acceptance of such bills, in execution of such agreement, was unlawful, regard being had to the Acts in force respecting the Bank of *England*.
2. That such acceptances would not be lawful, even if the *London* Joint Stock Bank, at the time of the acceptances, had in hand funds on account of the bank in *Canada* equal to the amount of the bills so accepted.
3. That the acceptances of such bills would not be lawful if the *London* Joint Stock Bank had not, at the time of the acceptances, any funds in hand belonging to the bank in *Canada*, but the bills were accepted on the credit of a contract by that bank to remit funds to meet such acceptances before the bills became payable.
4. That the Bank of *England* might maintain an action against the *London* Joint Stock Bank, founded on such transactions.

It is improper to print in the Appeal Cases, or Appendix, the interrogatories in a bill or other unnecessary matter.

Practice.

If the second counsel for an Appellant cannot attend in his turn, the House will hear him afterwards in reply to the Respondent's counsel, but will confine him strictly to the reply.

THE Appellant *George Pollard* is the manager of, but not a partner in, the *London* Joint Stock Bank,

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which is a co-partnership, consisting of more than six persons, carrying on the business of bankers in the city of *London*. The other Appellants are partners in and directors of that company. In *July* 1836 they issued a prospectus, explanatory of the objects of the company, stating, among other things, that their capital would be 3,000,000 *l.*, in 60,000 shares of 50 *l.* each; that the company would transact all the various branches of business legitimately belonging to banking concerns and to general agency in the money market, under the superintendence of a chairman, deputy-chairman, and board of directors; that the directors would cause a deed of settlement to be prepared in conformity with the Acts of Parliament relating to joint-stock banks, &c. A second prospectus, issued in *October* of the same year, stated that the bank would open in their temporary offices on *Monday* the 21st of *November* then next, and the directors invited the attention of the public to the mode in which the business would be conducted, viz. "Accounts of parties, properly introduced, will be received agreeably to the present custom of *London* bankers, with this advantage, that interest will be allowed on current accounts and on deposits. Sums of money will be received on deposits, at such rate of interest and for such periods as may be agreed upon, reference being had to the state of the money market. The agency of joint-stock and other country and foreign banks will be undertaken upon such terms as may be agreed upon," &c. Other prospectuses were issued afterwards in the same year and in 1837, further enlarging on the objects of the institution, and on the advantages to be derived from it.

The company commenced business in *November* 1836, and shortly after advertised that they were ready to act as the *London* agents of foreign banks. Appli-

cation was consequently made to them by a bank, carrying on business at *Kingston*, in *Upper Canada*, called the Commercial Bank, to know the terms upon which they would undertake their agency in *London*. The application was by letter, dated the 14th of *March* 1837, addressed by Mr. *Harper*, the cashier of the Commercial Bank, to the Appellant *George Pollard*. The following is an extract: “In consequence of having seen, in a *London* newspaper, an advertisement by your bank, dated the 21st *November* last, stating its wish to become the agent for foreign banks, I am directed by the board of this institution to address you on that subject. Messrs. *T. Wilson & Co.* have been our agents since *February* 1833; from which time to the 31st *December* last we have remitted to them, in drafts and specie, 382,373*l.* sterling, the commission paid them 1,911*l.* 17*s.*, and interest on account current 765*l.* 17*s.* 6*d.*” “Their commission is half *per cent.* on the D^r. side of the account, charging and allowing 4*l.* *per cent.* interest. They engage to accept drafts of the president to the extent of 40,000*l.* sterling beyond the effects which may be in their hands; it being understood that such drafts shall in all cases be covered by remittances within 60 days from the period of their issue, the usual time for drafts on *London* being 60 days’ sight. I beg further to add, that it is probable this bank may wish the credit extended from 40,000*l.* to 60,000*l.* sterling, on which to draw in case of need, when our new capital is paid in.”

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On the 26th of *April* 1837, the *London* Joint Stock Bank wrote to the Respondents the following letter:—

“Gentlemen,—Having received from a transatlantic chartered bank the offer of their agency, which

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would involve the necessity of this bank accepting their drafts payable at a shorter date than six months, the directors of this bank are desirous of knowing whether the directors of the bank of *England* would interpose any difficulty in the way of this bank accepting such drafts.

“ I have the honour, &c. *Geo. Tayler*, Chairman.”

The secretary of the Bank of *England* wrote to the *London Joint Stock Bank* the following letter in reply :—

“ Bank of *England*, 27 April 1837.

“ Sir,—I am desired to acknowledge the receipt of your letter of the 26th instant, addressed to the Governor and Court of Directors of the Bank of *England*, in which you ask whether the Directors of the Bank of *England* would interpose any difficulty in the way of the *London Joint Stock Bank* accepting drafts payable at a shorter date than six months: and in reply I have to state that such acceptances would be an infraction of the privileges of the Bank of *England*, and, as respects the public, would be illegal and void, and consequently could not be permitted by this corporation.

“ I have the honour, &c. *William Knight*.

“ *George Tayler*, Esq. &c.”

On the 6th of *May* 1837, the board of directors of the *London Joint Stock Bank* resolved as follows: “ That a communication be made to the *Kingston Bank*, stating the directors’ readiness to accept their account on the following conditions: that their drafts to the extent of 40,000 *l.* on the manager of this bank be accepted by him in his individual capacity; or

that, instead of drawing, they issue promissory notes payable at this bank : that half *per cent.* commission be charged : that interest be charged at the rate of 5*l. per cent. per annum* when this bank is under cash advance, and allowed at the rate of 4*l. per cent.* when the balance is in their favour."

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In pursuance of that resolution, Mr. *Pollard* wrote to the cashier of the *Canada* Bank, a letter dated the 6th of *May* 1837, from which the following are extracts :—

" *London* Joint Stock Bank, 6 *May* 1837.

" I have to acknowledge the receipt of your favour under date of the 14th *March*, which has been laid before our board of directors, who have desired me to reply thereto. You are perhaps aware that by the charter of the Bank of *England*, no joint-stock bank can accept bills of exchange in *London*, or within 65 miles of it, at a less date than six months: at least such is the construction put upon the charter by the Court of Common Pleas and the Master of the Rolls. It suggested itself to our directors that some difficulty might arise in the way of accepting your agency from this circumstance; and they therefore applied to the Bank of *England* to know whether, under the circumstances in which the monetary concerns of the two countries were placed, they would avail themselves of the privilege they claim to prevent this bank accepting transatlantic bills at a short date. The directors of that institution have thought proper to give a negative answer to our proposal, and we much feared that the plan which had been adopted by us with great success, as far as *English* country banks were concerned, could not be extended to

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America. Our plan is this : instead of their drawing bills requiring an acceptance, they issue promissory notes payable at the *London Joint Stock Bank*. Another mode of getting over the difficulty has been suggested ; which is, that parties whose agency this bank might take, should draw upon me in the following form :—‘ To *Geo. Pollard*, esq., manager of the *London Joint Stock Bank, London* ;’ and that the due payment of my acceptances should be guaranteed by this bank.

“ Having now explained to you fully our position, it remains only for me to state that this bank, relying upon the statements contained in your letter, will be happy to undertake your agency upon the following terms : that this bank shall pay your promissory notes, drawn at three months’ date, to the extent of 40,000*l.*, upon the understanding that you remit us funds in cash or bills within 60 days from the period of this issue ; or if you prefer it, I will accept your bills to a similar amount, at 60 days’ sight, with a like understanding. I mention 40,000 *l.*, that being the advance you at present require ; but should your transactions increase, we shall be happy to meet you with liberality on this point. The commission you name is considerably under the charge for transatlantic business ; but as it is what you have been in the habit of paying, we of course cannot ask you to increase it.

“ With regard, however, to the interest charged and allowed you by your present agents, we do not feel that it is a correct principle to charge and allow the same rate. The mode we should propose to adopt (and it is the general rule in banking transactions), is to make a difference of 1 *l. per cent.* in the rate, according to the value of money. For the present,

while money is so scarce, we should propose to charge you 5*l. per cent.* upon the amount we may be in advance to you, and to allow you 4*l.* Should money decrease in value we should charge 4*l.* and allow 3*l. per cent.*, or charge 3*l.* and allow 2*l.*, according to the current rate of the market; and I consider that on an average you would be considerable gainers by the change. The slight difference between the terms proposed by you, and those to which our directors are willing to accede, leaves me no doubt that a connexion will be formed between us, which I trust will long continue to our mutual advantage."

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In reply to this letter, the cashier of the *Canada Bank* addressed to Mr. *Pollard* a letter, dated 21st *June* 1837, from which the following are extracts:—

" M. D. *Kingston*, 21 *June* 1837.

" Sir,—Your favour of the 6th ultimo has come to hand, the contents of which having been submitted to the board, I am directed to inform you that the explanations relative to the principles on which your institution conducts its business has met the approbation of the board of this bank, and has had its influence in deciding them to close with your offer on the terms expressed in your letter, viz. that of making a difference of 1*l. per cent.* on the charge of interest, debiting this bank at the rate current in your city for the half years ending 30th *June* and 31st of *December*, on your advances, and crediting us at 1*l. per cent.* less on balances in our favour in your hands; your charge of commission being one-half *per centum*. The board are perfectly satisfied with the credit of 40,000*l.* at present; and it will only be when the commerce of the country takes a more favourable

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turn, and that our capital is increased, that we will take advantage of your offer to augment it.

“ The board have also taken into consideration both the modes you propose for valuing on you so as not to come within the power of the Act in favour of the Bank of *England*, and prefer that of drawing on you as manager at 60 days' sight, being the dates at which bills are commonly negotiated, and which the public would prefer. Such being their decision, please send me a guarantee of your bank to protect the drafts of the president of this institution.

“ I remain, &c. *J. A. Harper*, Cashier.”

This letter was submitted to a board of directors of the *London Joint Stock Bank*, held on the 26th of *July* 1837, when the following resolution was come to:—“A letter dated 21st *June*, from the *Kingston Commercial Bank, U. C.*, having been received, it was resolved, that in conformity with the request of the *Kingston Commercial Bank* of the Midland District, *Upper Canada*, a letter be written to the president and directors of said bank, enclosing two of the printed forms of agreement, signed by the trustees of this bank, with the following additional words: ‘ And that the said *London Joint Stock Bank* will provide on your behalf the necessary funds to pay at maturity all such bills as may be drawn by the said bank upon, and accepted by, Mr. *Geo. Pollard*, manager of the said *London Joint Stock Bank*, such bills being accepted by him in his individual capacity:’ with a request that the president and directors will return one of such agreements signed by them.”

In pursuance of that resolution, the secretary of the *London Joint Stock Bank* wrote to the *Canada Bank*

a letter, dated the 20th of *July* 1837, of which the following is a copy :—

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“ Gentlemen,— I am directed by the board of directors of the *London Joint Stock Bank* to acknowledge the receipt of your letter, addressed to Mr. *Pollard* the manager, under date 21st *June*, and to express their satisfaction that the intercourse which has already taken place between the two companies has resulted in the formation of a permanent connexion. The directors of this bank quite approve of the mode of drawing which you have selected ; and I beg leave to enclose you two copies of the contract which the state of the law in this country makes it necessary for this bank, as a joint-stock company, to enter into with the parties keeping accounts with it ; to which you will perceive such words have been added as the circumstances of the case and your request made necessary. These are both signed by the six trustees of this company ; and I am to request that you will be pleased to execute them on your part, and to return one of them to me, retaining the other in your possession, in conformity with the desire expressed in your letter.

“ I am, Gentlemen, your obedient servant,
Michael Boyle.”

The copies of the contract enclosed in the letter were as follows :—

“ To the Commercial Bank of the Midland District,
Kingston, Upper Canada.

“ *London, 26th July 1837.*

“ Gentlemen,— In consideration of your keeping a banking account with the *London Joint Stock Bank*, we, as trustees of the company, hereby engage that the capital stock and funds of the company shall be

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liable to you for, and shall make good to you, any balance that may become due to you on your current and other accounts with it; and that the said *London Joint Stock Bank* will provide on your behalf the necessary funds to pay at maturity all such bills as may be drawn by your bank upon, and accepted by, Mr. *George Pollard*, manager of the said *London Joint Stock Bank*.

“ We are, Gentlemen, your obedient servants,

“ *W. M. Christie.* *George Scholefield.*

J. P. Darthez, jr. *W^m Shadbolt.*

George H. Foster. *W^m Venables.”*

“ To Messrs. *W. M. Christie, J. P. Darthez, jr., G. H. Foster, G. Scholefield, W^m Shadbolt, and W^m Venables*, Trustees of the said *London Joint Stock Bank* :

“ Gentlemen,— You having engaged that the capital stock and funds of the *London Joint Stock Bank* shall be liable for, and shall make good any balance that may become due to us on our current or other accounts with it, we hereby agree as a separate contract with you, to pay to you and the survivors and survivor of you, or the trustees of the company for the time being, on demand, such sum or sums of money as may at any time be due from us to the said bank.”

The latter agreement was subsequently returned to the *London Joint Stock Bank*, signed by the president of the *Canada bank*, and dated 11th *September* 1837. Early in *July* 1837, the *Canada Bank* commenced drawing bills on *George Pollard*, esq., as manager of the *London Joint Stock Bank*, and amongst others, drew a bill, dated the 25th of *July* 1837, of which the following is a copy :—

“ *Kingston, U. C., 25th July 1837.*

“ £. 1,000 stg.

“ Sixty days after sight pay this my first
of Exchange 2d and 3d unpaid, to the order
of *Fra^s A. Harper,* Esq., Cashier, the sum of
One Thou sand Po unds sterling, value re-
ceived, which place to account of the Com-
mercial Bank Midla nd District, with or without
further advice.

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“ *John S. Cartwright,* President.

“ To *George Pollard,* Esq. Manager,
London Joint Stock Bank, London.”

This bill was sent over to the Bank of *England* among other remittances from *America*, and was received here in *September 1837*. It was presented for acceptance, and was accepted in the form appearing above. The officers of the Bank of *England* having some doubt, in consequence of the omission of the word “manager,” whether the acceptance was such as they were bound to require, the bill was put into the hands of their notary, who presented it again at the *London Joint Stock Bank* for an acceptance according to its tenor. In answer, one of the clerks stated that the acceptance on it was sufficient, and that the *London Joint Stock Bank* was ready to discount the bill. A protest was thereupon drawn up as for non-acceptance, but the Bank subsequently received the amount of the bill *minus* the discount. Mr. *Pollard* wrote to the cashier of the *Canada Bank* a letter, dated the 6th of *October 1837*, which, after referring to what had taken place, stated as follows: “ I beg to suggest that it may altogether be obviated by your hereafter omitting the word ‘ manager,’ addressing your drafts to ‘ *Geo. Pollard, Esq.* at the

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London Joint Stock Bank, London.” This having been agreed to by the Commercial Bank, the word “manager,” in the bills subsequently drawn, was dispensed with. The form of the acceptance of the bills was also altered by introducing the word “payable” before the word “at;” so that the subsequent acceptances stood thus: “Accepted, payable at the *London Joint Stock Bank.*—*Geo. Pollard.*”

On the 26th of *October* 1837, the solicitors to the Bank of *England* wrote to the directors of the *London Joint Stock Bank* a letter, of which the following is a copy:—

“Gentlemen,—The attention of the governors and directors of the Bank of *England* has been drawn to bills of exchange which have recently appeared drawn by a bank in *Upper Canada*, for which it appears you act as *London* agents, upon your manager, and accepted at your office. The Bank are advised that the acceptance of such bills, having less than six months to run, is a violation of their exclusive privilege; and we request to know whether it is intended to persist in the practice, as in that case we are instructed to take immediate proceedings to obtain an injunction from a Court of Equity.

“We are, &c. *Freshfield & Son.*”

In reply, the said solicitors received from the directors of the *London Joint Stock Bank* the following letter, dated the 2d of *November* 1837, signed by their secretary:—

“*London Joint Stock Bank, 2d Nov. 1837.*

“Gentlemen,—Your letter of the 26th ult., addressed to the directors of this bank, was laid before the board yesterday; and in reply thereto, I am instructed to

state that the directors deny that any practice has been adopted by the *London Joint Stock Bank* which is a violation of the exclusive privilege of the Bank of *England*; the *London Joint Stock Bank* never having accepted, nor directed nor authorised their manager, or any other person, to accept any bills of exchange having less than six months to run. I am, &c.

To Messrs. *Freshfield & Son.* *Michael Boyle.*"

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In *November* 1837, the Respondents filed their bill in Chancery against the Appellants, stating the Act of 5 & 6 *W. & M.*, c. 20, establishing the Bank of *England*; and the Acts of 8 & 9 *W.* 3, c. 30; 6 *Anne*, c. 22; 39 & 40 *G.* 3, c. 28; 7 *G.* 4, c. 46, and 3 & 4 *W.* 4, c. 98; all granting and securing to it certain exclusive privileges (*a*); and that by the last-mentioned Act, it was, among other things, enacted, that during the continuance of the said privileges no other body corporate, society or company, or persons united or to be united in partnership, exceeding six persons, should issue, in or within 65 miles of *London*, any bill of exchange or promissory note, &c. for payment of money on demand, &c.; but still that any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, might carry on the trade or business of banking in or within 65 miles of *London*; provided such body, &c. did not borrow, owe, or take up, in *England*, any sum or sums of money on their bills or notes, payable on demand, or at any less time than six months from the borrowing thereof," &c.

The bill then stated the establishment of the *London Joint Stock Bank* by deed of partnership, in 1836,

(*a*) The material parts of these Acts are set forth in the case of *The Bank of England v. Anderson*, 2 Keen, 328 & 367, so frequently referred to in the arguments and judgment in this case.

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and set forth extracts from the various prospectuses issued by the directors, and their correspondence with the Commercial Bank of *Kingston* in *Canada*, and with the Respondents, to the effect before stated; and after charging that the said agreement and transactions between the Appellants and the Commercial Bank of *Canada* were violations of the rights and privileges of the Respondents, the bill prayed for an account of all bills of exchange and promissory notes accepted or caused to be accepted by the Appellants on behalf of their partnership, payable at less than six months from acceptance thereof, and particularly of all such bills and notes drawn upon the Appellants' company and accepted by the Appellant *G. Pollard*, in the form in which the said bill dated the 25th of *July* 1837 was accepted, and payable at less time than six months from acceptance thereof; and also an account of the gains and profits made by such acceptances, &c.; and that it might be decreed that the accepting, or causing to be accepted by *G. Pollard* the said bill of exchange, in the manner aforesaid, was a fraud upon the Respondents; and that the Appellants might be restrained from accepting or causing to be accepted, for or on behalf of the *London* Joint Stock Bank, any bill of exchange or promissory note payable at less than six months from the acceptance thereof; and from accepting or causing to be accepted by *G. Pollard*, or any agent of theirs, in the form in which the said bill of the 25th of *July* 1837 was accepted, any bills of exchange or promissory notes drawn upon the said company, payable at less time than six months from acceptance thereof; and that all the Appellants might be restrained from in any manner borrowing, owing, or taking-up in *England*, for or on behalf of the said Joint Stock Company, any sums of money on bills or

notes of the company payable on demand, or at less time than six months from the borrowing thereof.

The Appellant *G. Pollard* put in his answer to the bill in *February* 1838; and the Appellants the directors put in their joint answer in the month of *March* following. Both answers submitted that the acceptance by *Pollard* of the bills of the Commercial Bank of *Canada* was not a violation of the exclusive privileges secured to the Respondents by the said Acts of Parliament.

As soon as these answers were put in, the Respondents moved, before the Master of the Rolls, for an injunction against the Appellants, upon notice, in the terms of the prayer of the bill.

Lord *Langdale*, M. R., by an order, dated the 16th of *June* 1838, granted the injunction “to restrain the partnership called the *London Joint Stock Bank*, and every partner therein, and the Appellant *G. Pollard*, and every clerk of the said partnership, from accepting or causing to be accepted, in the name of the said partnership or of *G. Pollard*, &c., in the course of their banking transactions, any bill of exchange payable on demand, or at any time less than six months from the acceptance thereof.”

That was the order now appealed from. The appeal was argued in the presence of the Judges (*b*).

Mr. *Kindersley*, for the Appellants:—There is no difference between the parties as to the facts of the case. The deed of partnership, and the prospectuses which were put forth by the Appellants before and after they opened their bank, indicated a bank of

(*b*) Lord C. J. *Tindal*; Justices *Littledale*, *Bosanquet*, *Paterson*, *Williams*, *Coleridge*, *Coltman*, *Maule*, and *Rolfe*; and Barons *Parke* and *Gurney*.

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deposit and not of issue. The only bye-laws made under the powers contained in the deed were two resolutions, by the first of which, passed in *November* 1836, the directors, to whom the deed of settlement gave the entire and exclusive management and superintendence, appointed the Appellant *George Pollard*, "Manager of the bank, exclusively to indorse all such bills of exchange, promissory notes, and other negotiable securities, and to draw such cheques in the name or on account of the company, or the trustees thereof, as may be necessary in the usual course of business." By the second bye-law, made in *April* 1837, it was resolved, "That no bill or note be issued for a less amount than 100*l.*; that the amount of bills or notes, with the above reservation, be divided into such sums as will meet the wishes of depositors, to cover the amount of their deposit and interest, the depositors paying for the stamps; that all bills be accepted by the manager, signed by the depositors as drawn, entered by the clerk, &c.; that all notes be signed by the manager, and entered by a clerk, &c.; that after such signatures and entry, all bills and notes for issue shall be laid before the chairman, who shall examine if the signatures are proper," &c. In conformity with this resolution, forms of deposit, notes and bills, and deposit receipts, were printed. Neither the deed of settlement nor any resolution or bye-law conferred any other power on the directors, or any other officer of the company, to sign, or authorized any person to sign any bills or notes, or other negotiable securities; and no deposit note or bill has been filled up for a less sum than 100*l.*, or made payable at a shorter period than six months from the issuing thereof. The deposit receipts are not negotiable, or capable of transfer or assignment by indorsement or delivery.

The correspondence set forth in the printed cases shows that the transactions, of which the Respondents complain, had their inception in the desire of the bank in *Canada* to avail themselves of the agency, in this country, of the *London* Joint Stock Bank. The proposition was made by the *Canada* Bank, and was entertained by the Appellants without any desire to interfere with the exclusive privileges of the Bank of *England*. Two modes of agency were open to the foreign bank; either to issue their promissory notes payable at the Appellants' bank in *London*—a mode generally adopted—or to issue their bills drawn on their *London* agent. This latter course was preferred, and the question is, whether the transactions so carried on are a violation of the privileges secured by Acts of Parliament to the Bank of *England*; and a more important question to the commercial interests of this country has never been brought before the House.

By the contract between the foreign and *London* Banks, the *London* Bank engages that its funds shall be liable for all balances of accounts due to the foreign bank, and that it shall provide the necessary funds to pay all bills that may be drawn by the foreign bank “upon and accepted by *George Pollard*, manager of the said *London* Joint Stock Bank.” There is no illegality on the face of that contract; it is not an infringement of any privilege of the Bank of *England*. The bills of exchange accepted by *Pollard*, in pursuance of that contract, were his own acceptances, and not the bills or acceptances of the *London* Joint Stock Bank. The particular bill set forth in the pleadings, having come to the hands of the Respondents, was presented by them to *Pollard* for his acceptance; and, not satisfied with the form in

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which he accepted it, they sent it back to him to alter his acceptance; with a view, no doubt, of having some ground of complaint against the *London Bank*: and because *Pollard* refused to make the required alteration, though he offered to discount the bill, they got it protested for non-acceptance, preferring to have a bad bill rather than the money. They afterwards demanded and received the amount of the bill, *minus* the discount; and then remitted the protest to their correspondents in *Canada*, for the purpose of damaging the credit of the *London Joint Stock Bank*. The whole proceeding was most discreditable to the Respondents, and showed the motives by which they were actuated against the Appellants.

By that proceeding, the Respondents deprived themselves of all right to the protection of a Court of Equity, in respect of that bill and acceptance. A Court of Equity will not relieve a party who has not only acquiesced in, but instigated, the act of which he complains. The Respondents, instead of refusing to take the bill, as they might, bring it to the *London Bank*, and try to get that act accomplished, for preventing which they afterwards apply for an injunction. —[The *Lord Chancellor*: How could they refuse the bill, acting themselves as agents for their correspondents in *Canada*? If you rely on acquiescence, you must make out a case of acquiescence, showing knowledge.]—It is not open to the Respondents, after obtaining the individual acceptance of *Pollard*, to complain that it was not his acceptance, but the acceptance of the *London Joint Stock Bank*. The Respondents have now no ground of complaint, because, even before the Respondents filed their bill in Chancery, the *Canada Bank* ceased to address bills of exchange

to *Pollard*, and he ceased to accept such bills in the form of which the Respondents complain.

The argument in the Court below, on the part of the Respondents, was, that although the acceptances were by *Pollard* in his own name, the *London* Joint Stock Bank, consisting of more than six persons in partnership in *London*, borrowed, owed, and took up money on the bills so accepted, and payable at less time than six months from the acceptance; and they relied upon a clause first introduced into the miscellaneous Act of the 6th of *Anne*, c. 22, and copied with some addition into subsequent Acts, and lastly into the Act 3 & 4 *W. 4*, c. 98, by which, after reciting that doubts had arisen as to the construction of the said Acts, and as to the extent of such exclusive privilege, and that it was expedient that all such doubts should be removed, it was declared and enacted, “that any body politic or corporate, or society, or company, or partnership, although consisting of more than six persons, might carry on the trade or business of banking in *London*, or within sixty-five miles thereof; PROVIDED that such body politic, &c. did not borrow, owe, or take up, in *England*, any sum or sums of money on their bills or notes, payable on demand, or at less time than six months from the borrowing thereof, during the continuance of the privilege granted by that Act to the Governor and Company of the Bank of *England*,” &c. All the clauses in that and in the preceding Acts, securing privileges to the Bank of *England*, are set out in the Respondents’ bill, which is printed at length in the Appellants’ appendix, even the interrogatories.

[The *Lord Chancellor*:—It was extremely improper to print the interrogatories, overloading the appendix with unnecessary matter.]

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They were printed because some comment was made in the Court below on the alleged insufficiency of the answers to them.

The general scope of those Acts, down to the 7th of *W. 4*, c. 46, was to secure to the Bank of *England* a monopoly of the paper currency of the country. The mischief which they purported to prevent was the danger of a great number of persons without property uniting together in partnership and obtaining from individuals large sums of money, with which they might deal as bankers. "The great grievance," as Lord Chief Justice *Tindal* said (c), in delivering the judgment of the Court in *The Bank of England v. Anderson*, "to which the statute of *Anne* intended to apply a remedy, was that of other corporations and large numbers of persons united in partnership, contrary to the intent of the statute of *W. 3*, 'presuming to deal as a bank,' that is, as a bank of circulation and issue; for merely dealing as a bank of deposit could scarcely 'affect the credit of the Bank of *England*,' the security of which is the object mentioned in the title of the Act," &c. It was, however, found that much greater mischief arose from the monopoly of the Bank of *England*; and accordingly the privileges granted to that bank by the former Acts were, by the Act of 7 *W. 4*, c. 46, confined to *London* and to a circle of 65 miles round *London*. Upon the renewal of the Bank of *England* charter, in 1833, all the Acts respecting it were consolidated and explained by the Act 3 & 4 *W. 4*, c. 98, under the provisions of which the *London* Joint Stock Bank was established; and the whole question now between that bank and the Bank of *England* turns on the construction to be put on the

(c) 2 Keen, 373; 3 Bingh. N. C. 655.

several sections of that Act, particularly on the proviso before cited. The construction put on the words of that proviso “borrow, owe, and take up,” in the Courts below, both in this case and in the case of *The Bank of England v. Anderson* (d), was that the word “owe” was put in apposition to the word “borrow,” the meaning of the word “borrow” to be taken from the word “owe.” This House, instead of adopting that construction, will, it is hoped and submitted, reverse it, and hold that the meaning is, that there must be an “owing,” in the nature of a “borrowing and taking up sums of money.” If one accepts a bill, he “owes,” becomes liable to pay ; but he does not thereby “borrow and take up” money. The mischief guarded against by the Act of 6 *Anne*, c. 22, into which the clause was first introduced, was the taking up money by large companies, as appeared from the recitals therein. A construction is not to be put on the words that must force them out of their natural meaning. When the Respondents issue a 5*l.* note, they borrow, owe, and take up the amount on the face of the note. If a person having to send money to *France* or *Ireland* applies for a Bank post-bill, the Bank gives the bill and receives the amount ; which is a “borrowing, owing, and taking up,” so much as it so receives for its post-bill. The *London Joint Stock Bank* never borrowed, owed, or took up, any money in *England*, on the bills of exchange sent by the *Canada Bank*. They were not their bills.

[The *Lord Chancellor* :—Do you rely on the distinctions between this case and the case of *The Bank of England v. Anderson* ? I put the question to you because the fifth reason annexed to your case is, “Because, even if the acceptance of the said bill of the

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(d) 2 Keen, 328 ; 3 Bingham, N. C. 589.

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25th of *July* 1837, and the like acceptances of the like bills, were and are the acceptances of the *London Joint Stock Bank*, such acceptances are not in violation of the privilege of the Respondents.”]

The decision in *The Bank of England v. Anderson* may be assumed to be correct; but it does not govern this case, which is materially and in many circumstances distinguished from that case. The bill in that case was an inland bill drawn by a customer and partner, having himself a bank of issue within 65 miles of *London*; it was accepted by the *London and Westminster Bank*’s manager, by procuration of the trustees, making that bank liable on the face of the bill; and those trustees, who were the *London* bankers and agents of the drawer, by so accepting the bill, borrowed a sum of money in *London*; the accepting a bill of exchange constituting in all cases a “borrowing and taking up” money. The Appellants do not contend to the contrary of that view of the case of *The Bank of England v. Anderson*, but they submit that the distinctions between that case and their own case must lead to different conclusions of law. The bill in this case was a foreign bill, not likely to come in formidable competition with the paper currency of the Bank of *England*: it was addressed to an individual, and accepted by him, that individual being undoubtedly the manager of the Appellants’ bank, but not a shareholder. The Appellants also were bound to pay that bill, but they were so bound as agents for the foreign bank by contract, and not liable as acceptors of the bill to every holder of it. The holder of the bill could not sue the *London Joint Stock Bank* for the amount.

[The *Lord Chancellor*:—Is it a fact in this case that at the time of the acceptance of the bills there were in the *London Bank* assets of the *Canada Bank* ?]

There is nothing express on the subject in the bill or answers, but the inference from the arrangement between the two banks is that there were not assets. If a person is not drawer or acceptor of a bill, it is no bill of his ; he may be liable on contract or on guarantee to pay, but he is not liable on the bill. *Pollard*, the acceptor, was liable on this bill ; *Thomas v. Bishop* (e), *Leadbitter v. Farrow* (f). Lord *Ellenborough* in the latter case said, “ Is it not the universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states on the face of the bill that he subscribes it for another, or by procuration of another ; which are words of exclusion ? ” In *Emly v. Lye* (g), where one of two partners drew bills of exchange in his own name, and procured them to be discounted, he alone, and not the partnership, was liable to be sued on the bills, although the proceeds went to the partnership account : for “ the bills,” as Lord *Ellenborough* said, “ considering the transaction as a discount between the parties, are his only.” The cases of *Jackson v. Hudson* (h) and *Bramah v. Roberts* (i) are to the same effect ; so that even if *Pollard* was a partner of this bank, having no authority to accept bills on behalf of the partnership, he alone would have been liable to the holder of this bill.

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The Appellants do not desire to have this question put on a mere technical point ; but contend on broad principles that the intent of the Acts of Parliament on which the Respondents rely, being to prevent large partnerships from issuing a paper currency in competition with the Bank of *England*, was not violated

(e) 2 Strange, 955.

(f) 5 M. & Selw. 345.

(g) 15 East, 7.

(h) 2 Camp. 447.

(i) 3 Bingham N. C. 963.

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nor fraudulently evaded by the transaction between the Appellants and the *Canada Bank*. They admit that they desired to avoid and escape and keep clear of the prohibitions of those Acts, so as not to come within their scope; and they submit that they are entitled to resort to any lawful contrivance to keep themselves out of them. To evade what is forbidden is lawful, if the evasion is not itself an infringement of the law; and no Court of Law or Equity can prevent it. The nature of the arrangement shows that the Appellants took great pains not to do anything that was prohibited by the letter or spirit of the law.

In the judgment pronounced by the Master of the Rolls, his Lordship omitted some very important considerations in the case, and misapprehended some of the facts. He says, "*Pollard* is a mere agent, without any personal interest," &c.; and comes to the conclusion that the directors of the *London Joint Stock Bank* "owe money on the bills," and that the bills may be properly called "*their bills* (*k*);" that "they owe or become liable to pay the sum due on the bills;" that "the existence of this obligation or liability must be recognized;" that "they are answerable to the drawers:" but still his Lordship says, "I do not, however, think it necessary to give any opinion upon the question whether the *London Joint Stock Bank* can be sued directly upon such bills as these or not." This being the main question, it is surprising that his Lordship declines to give any opinion on it.

[The *Lord Chancellor* :—The injunction was granted on the ground that *Pollard* accepted the bills on behalf of and as the agent of the partnership.]

It is not contended that *Pollard* did not suppose he

(*k*) 2 Keen, 494–5.

was acting on behalf of the partnership in accepting the bills; he was willing to make himself liable on the bills, knowing that the partnership would provide the payment. The question is, does his acceptance of the bills, on that understanding, make these bills the bills of the partnership?—of which, be it recollected, he was not a member.

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[Mr. *Kindersley*, after concluding his argument, said—It is extremely desirable that the Appellants should have the benefit of Sir *William Follett*'s assistance: he is with me (*l*), but is at present engaged in an important case elsewhere. The House will perhaps hear him after the counsel for the Respondents.

The *Lord Chancellor*:—He may have the reply (*m*). We have done that in several cases.]

Sir *Frederick Pollock* and Mr. *Pemberton* (with whom was Mr. *G. Richards*), for the Respondents:—It may be assumed that the case of *The Bank of England v. Anderson*, in which the Court of Common Pleas pronounced a solemn judgment, after hearing elaborate arguments, and which the Master of the Rolls decided after much deliberation, is to be held as settled law; the appeal which was presented to this House against it having been withdrawn. It is next to be considered that the reasons given for the judgment in that case, in both the Courts, comprehended the whole of the material circumstances of the present case: and that the acceptances of the bills in question in this case were the acts of the *London Joint Stock Bank* by their agent *Pollard*. If so, they are in violation of the express terms of the Acts of Parliament, particularly the last Act, 3 & 4 *Will. 4*, c. 98, conferring exclusive privileges on the Bank of *England*; for which privileges that body from time to time has paid

(*l*) And Mr. *Willcock* also.

(*m*) *Vide post*, p. 536.

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very valuable considerations. If the acceptances are not a violation of the letter of these Acts, they are a fraudulent evasion of them.

With respect to the allegation of acquiescence, the answer is, that the Bank of *England* received the particular bill in question directly from abroad in the usual course of business ; sent it for acceptance, as all bankers or agents would ; and their notary conceiving that the acceptance was not according to the tenor of the bill, took it back for a more formal acceptance, which being refused he protested the bill. That protest was not sent to *Canada*, as alleged by the Appellants.

It may be conceded that the drawee of a bill of exchange, and another whose name is not on it, cannot be co-acceptors ; but the other, though not an acceptor, may be a guarantee. The acceptance in this case was by the servant of the *London Bank* ; but suppose it was by *John Styles*, and the *London Bank* merely guaranteed the payment of the bill when it came to maturity, would not a Judge leave it to the jury, in an action on the bill, to say whether the acceptance by the servant of the *London Bank* or by *John Styles* (though either may be himself liable on the bill) is not in effect the acceptance of the *London Bank*? *Trueman v. Loder* (n). The question would be, "Do you believe it was intended to bind the company by the name?" *Pollard*, in his answer, denies that this bill was accepted by him as the manager of the *London Joint Stock Bank*, or on their behalf, or on their credit, or for their benefit, but on behalf of himself, and for the benefit and on the credit of the *Canada Bank*. But from the course of dealing it is clear that *Pollard* represents the Joint Stock Bank : he by the deed of partnership, as the manager, has the exclusive power of signing, drawing, indorsing and accepting all

(n) 11 Adol. & El. 589.

bills of exchange, &c. in the name or on the account of the company ; and no bill accepted by any other person is binding on the company. It is impossible to believe that the bill or bills in question were accepted by *Pollard* in his individual capacity. He has no separate funds to pay them ; he carries on no business on his own account ; he has no offices or clerks of his own ; he is nothing but the clerk of the *London Joint Stock Bank*, at whose office the bills are left for acceptance, are accepted and paid. The funds to pay the bills are supplied by that bank, the books required for entries of these bills are kept by the clerks of that bank and belong to that bank, and not to *Pollard* ; and all entries of advice of such bills being drawn, of their falling due, and of their being paid, are made by the clerk of the establishment. *Pollard* was not the person liable for payment to the drawers of the bills ; the object of putting his name to them was to disguise the real nature of the transaction, and thereby to violate, if not the letter, at least the intent and spirit of the statutes.

[With respect to the construction of the words “ borrow, owe, and take up,” and of the other passages referred to in the statutes, the arguments were the same as those used, and the authorities also the same as those referred to, in the Courts below, in the two cases before referred to, *The Bank of England v. Anderson*, and *The same v. Booth* ; so fully reported by Mr. *Keen* and Mr. *Bingham*. One test of the liability of the *London Joint Stock Bank*, not introduced in the former argument, is now added : namely, could the *Canada Bank* recal any funds of theirs in the hands of the *London Bank*, while any one of these bills so accepted by *Pollard* was outstanding ? Would not the *London Bank* reply to such an application, “ We are

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liable on our agent's acceptance, and we 'owe' money on it; you cannot call on us to pay you back your money in our hands while that bill remains unpaid." *Wilson v. Barthrop* (n) shows that *Pollard* would not have been liable on this bill. In all respects it was the bank's bill.]

Sir *William Follett*, in reply :—This order cannot be sustained without changing the law; for legal principles, long established, are called in question by the arguments in support of the order; both the counsel for the Respondents maintaining that the *London Joint Stock Bank* is liable on these bills, while the Master of the Rolls expressly declines to give any opinion on that question. For the purposes of the argument in this case, it has been and it must be assumed that the case of *The Bank of England v. Anderson* is the settled law, as far as it goes, on this subject. But it does not affect this appeal. The Judges of the Court of Common Pleas in that case confined their opinion to the particular question submitted to them, and declined to give any opinion upon other points raised in the argument. The order of the Master of the Rolls in this case would have the effect of preventing foreign trade altogether; for it holds, that the acceptance of a foreign bill of exchange by more than six persons, in or within 65 miles of *London*, would be a violation of the Bank Acts; consequently the acceptance of such bill by a joint-stock trading company would be a violation of them—a result fatal to foreign trade. That was not the law of *England* before this decision was pronounced; *Murray v. The East India Company* (o), *Harvey v. Kay* (p), *Dickinson v. Valpy* (q), *Bramah v. Roberts* (r).

(n) 2 Mee. & W. 863.

(o) 5 B. & Ald 204.

(p) 9 B. & C. 356.

(q) 10 B. & C. 128.

(r) 3 Bingh. N. C. 963.

The legal question to be submitted to the Judges in this case is, was there a “ borrowing, owing, and taking up” money on those bills in *England* within six months from the time of acceptance, within the terms of the Act of 3 & 4 *W. 4*, c. 98?—[On that question he urged the same arguments and authorities that were used by Mr. *Kindersley*. See also the same arguments for the defendants, in *The Bank of England v. Anderson*, 2 Keen, p. 407 *et seq.*; and for the Appellants in the present case, in *The Bank of England v. Booth*, 2 Keen, p. 478 *et seq.* With respect to the right of a party to evade the prohibitions of a statute, *Thompson v. Brown*, 3 Myl. & K. 32, was cited as a case in point, being a contrivance to evade the legacy duty, which was recognised as perfectly legal.]

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The *Lord Chancellor*:—My Lords, if any doubt was entertained with respect to the correctness of the decision in the case of *The Bank of England v. Anderson* (s), this House would not proceed to adjudicate upon this case assuming that case to be the law, but would call upon the learned counsel to argue the case upon that ground, in order that your Lordships might come to a conclusion whether that was an accurate decision or not, having the advantage of the assistance of the learned Judges. But after examining that case, I certainly cannot bring myself to entertain any doubt with respect to the accuracy of the law there laid down; and I cannot conceive that the Appellants have lost anything by its being assumed, for the purpose of the argument, that that case was properly decided. Then if we are to take that case to be the law, the question

(s) 2 Keen, 328; 3 Bingh. N. C. 589.

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is, how far the circumstances of this case create any distinction, so as to make the rule of law which was applied to the circumstances in the case of *The Bank of England v. Anderson* applicable to this case. And in proposing questions for the Judges, your Lordships' object will be to put them in such form as will draw from the learned Judges an opinion how far the difference of the circumstances in the two cases would affect the decision in point of law.

There are three circumstances relied upon as distinguishing this case from the case to which I have referred: the first is, that the bill of exchange that was accepted in that case was an Inland bill of exchange; and in the present case it is a Foreign bill of exchange. The next circumstance, and the most important one no doubt, is the mode in which the acceptance of the bill in this case was made, not being made by the company, nor in the name of the company, but by *George Pollard*, under the circumstances that appear upon the face of these proceedings: and the third circumstance is, that in the case of *The Bank of England v. Anderson*, it was a fact stated, that at the time the company accepted the bill, they had funds in their hands equal to the amount for which the bill was accepted; whereas in this case the contract is not confined to the circumstance of the company in *London* having funds in hand, but it is part of the contract that they should accept bills, looking to the company in *Canada* remitting the money, though not in hand at the time, but in time to meet the acceptance when due.

With regard to the first point, I do not perceive how there can be any distinction between the two cases, arising from the circumstance of the bill being a foreign bill in the one case, and an inland bill in the

other. The object of the Acts of Parliament is to protect the Bank of *England*; and what the Respondents had to guard against, and which they have endeavoured to guard against, is the credit attached to a paper circulation, within certain limits, arising from the credit of more than six persons being associated together within those limits: and therefore the circumstance that a transaction within the prescribed limits had its origin beyond the limits of this country, does not appear to me to affect the case.—[His Lordship then proposed, for the opinions of the Judges, four questions, which are stated in the answers given.]

The Judges desiring time to consider the questions, the further consideration of the case was postponed.

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Lord Chief Justice *Tindal*:—My Lords, the facts stated by your Lordships as the ground-work of the questions proposed to Her Majesty's Judges, are these: "The *London* Joint Stock Bank, under circumstances which would have made it illegal in them as a company, and a violation of the rights and privileges of the Bank of *England*, to have accepted and issued the bills hereinafter mentioned, if drawn upon them; enter into an agreement with a bank in *Canada* to procure bills drawn by such bank upon *George Pollard*, the manager of the *London* Joint Stock Bank, to be accepted by the said *George Pollard*, and to provide funds for the due payment of such bills, the money transactions arising therefrom being, in the accounts between the two banks, to be treated in all respects as transactions between the said two banks:" And the first question proposed by your Lordships on this state of facts is, "Whether the acceptance of such bills by the said *George Pollard*, in execution of this

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agreement is lawful, regard being had to the Acts in force respecting the Bank of *England*?"

In answer to that question, I beg to state to your Lordships, that it is the unanimous opinion of those Judges who heard this case discussed at the bar of your Lordships' House, that,—assuming, according to the terms of that question, that the acceptance of such bills by the *London* Joint Stock Bank, if drawn directly on that company, would have been illegal and a violation of the rights and privileges of the Bank of *England*,—it appears to us to be a necessary consequence that the procurement by the *London* Bank, that bills drawn upon *G. Pollard*, their manager, shall be accepted by the said *G. Pollard*, under the agreement above stated for the providing of funds for the due payment of such bills, must equally be a violation of the rights and privileges of the Bank of *England*; upon the principle that whatever is prohibited by law to be done directly, cannot legally be effected by an indirect and circuitous contrivance.

The exclusive privileges conferred on the Bank of *England* by Parliament are founded on a contract between that Body and the Public. For the original grant, and also for the renewal and confirmation of such privileges, the Bank of *England* has from time to time paid very large sums of money to the Public; and no member of that Public can justify either doing, or procuring to be done, any act which, for the protection of such rights and privileges, has been forbidden by law. Now it is impossible not to see that the substantial parties to the transaction stated by your Lordships are the *Canada* Bank and the *London* Joint Stock Bank; and that the manager of the *London* Bank, who lends his name, is a mere nominal

acceptor, whose name is used to cover the transaction. It is the *London* Bank, not the manager, who is to pay the bill, and the *Canada* Bank engages to remit funds for that purpose before the bill becomes due. By means of this transaction the *London* Bank takes upon itself the duty of an acceptor; that is, to pay the bill, not in default of the nominal acceptor, but in the first instance, in consideration of an arrangement that funds shall be remitted by the *Canada* Bank (the drawers) for that purpose to them, the *London* Bank.

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The plain object and intent of the various statutes which have been passed for the protection of the Bank of *England* are, that the funds of a joint-stock banking company shall not be pledged for the payment of a bill issued within a limited distance from *London*, and having less than six months to run. Such a pledge given by the acceptance of a bill by such a company has already been decided, by the case of *The Bank of England* v. *Anderson*, to be a violation of the rights and privileges of the Bank of *England*. But if the bill be accepted by a servant or nominee of the banking company, and they contract with the drawer that they, the company, will pay it, their funds are bound for the payment; the bill is circulated upon their credit, not upon that of their servant or nominee; for it is impossible to suppose for a moment that bills accepted in such form and under such circumstances can be circulated in *London* upon the individual credit of the nominal acceptor, or upon any other credit than that of the banking company, by whose procurement and direction, and for whose benefit, the acceptance is really given. The consequence of such a transaction is, that a competition is necessarily created between a paper currency circu-

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lating upon the credit of the banking company, and the paper issued by the Bank of *England*; which is the very mischief intended to be prevented; for it is obvious that if the transaction is legal with respect to a bill at less than six months, it is equally so with respect to a bill at six days, or even at a shorter period.

It is contended on the part of the *London* Joint Stock Bank, that they are authorized to take any course with impunity, which does not fall directly within the precise terms and letter of the prohibitory clauses, contained in the several Acts which secure the privileges of the Bank of *England*. It is to be recollected, however, that the clauses protecting those privileges are not merely prohibitory laws. The privilege granted to the Bank of *England* by Parliament is a positive right conferred upon that body for a valuable consideration, which the law will no more permit to be infringed by third persons without a responsibility, than it will a monopoly granted by letters patent under the statute of *James I.* If, therefore, the acceptance of a bill by the *London* Bank will be an infringement of such privilege, it cannot be less an infringement, if attended with the same injurious consequences to the Bank of *England*, to procure another person to accept the bill for the benefit of the *London* Bank; though such acceptance be made in the name of their appointed nominee, whom they are bound to indemnify.

The second question proposed by your Lordships upon the above statement of facts, is this: "Whether the acceptance of such bills would be lawful, assuming that the *London* Joint Stock Bank at the time of such acceptances had funds in their hands, on account of the bank in *Canada*, equal to the amount of the bills

so accepted?" And if the answer given to the first question be correct, the acceptance by a person procured for that purpose by the *London Joint Stock Bank* must be considered in the same light as if the acceptance had been made by the banking company in its own name; and if that be so, the answer to the second question will be found in the opinion given by the Court of Common Pleas to the Master of the Rolls, upon a case stated to that Court, and confirmed by that noble and learned Judge in the case of *The Bank of England v. Anderson* (*t*). The opinion of the Court of Common Pleas upon this point was thus expressed: "The relation of debtor and creditor, created by the acceptance of the bill, appears to be considered by the Legislature as equivalent to the actual borrowing of the money owed on the one hand and credited on the other." And the Master of the Rolls, when reviewing the opinion of the Court of Common Pleas, says (*u*), "From the time of borrowing, means, from the time of owing the money on the bills or notes referred to; or, in the case now under consideration, from the time of the acceptance."

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The case of *The Bank of England v. Anderson* was very fully argued, and was much considered, both in the Court of Law and in the Court of Equity. From the latter Court an appeal might have been made to your Lordships' House: such an appeal indeed is said to have been at first made, but afterwards abandoned, and the decision of the Courts of Law and Equity was thereby acquiesced in. The authority of that case was not disputed in the argument at your Lordships' bar upon the present occasion; and we see no reason to doubt the propriety of the opinions therein expressed.

(*t*) 3 Bingh. N. C. 589.

(*u*) 2 Keen, 365.

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The third question proposed is this: “ Would the acceptance of such bills be lawful, assuming that the *London Joint Stock Bank* had not at the time of such acceptances any funds in hand belonging to the bank in *Canada*, but that such bills were accepted on the credit of a contract by such bank to remit sufficient funds to the *London Joint Stock Bank* to meet such acceptances before the time at which the bills would become payable?” And notwithstanding the difference in the state of facts adverted to in this question, it appears to us that the answer we must give to it is the same as that which we have already given to the second question. If a bill be accepted upon the undertaking of the drawer to supply funds for the payment of it, a mutual contract, of lending on the one hand, and borrowing on the other, is thereby created; and although the drawer may not fulfil his engagement by actually remitting the amount agreed upon before the acceptance, or even before the day on which the bill becomes due, the transaction is not the less a transaction of lending and borrowing to the amount of the money represented by the bill; which transaction takes effect as “ a borrowing upon the bill” as soon as the bill is accepted. If, therefore, the bill be drawn under such an engagement as above mentioned, at less than six months from the date, it must necessarily be considered as a bill payable at less than six months from the borrowing of the money.

It is manifest that the introduction into the Acts of the word “ borrowing,” instead of “ date,” to express the time of the currency of the bill, was only resorted to for the purpose of preventing the issue of bills appearing to be drawn at longer periods than six months from the date, but in fact issued at periods when the bill would fall due within a shorter time

than six months from the issuing of them ; and it is to be observed that bills or notes payable on demand are prohibited absolutely, without reference to any transaction of borrowing, upon which they have been issued. The word “ borrowing ” is only employed with respect to bills and notes payable at a future time, in order to designate the period from which the six months are to be reckoned. A borrowing is assumed to exist as soon as the banking company begins to owe the money specified in the bill or note ; that is, as soon as the acceptance or the note is put in circulation ; and the expression “ borrowing ” is not used as descriptive of the consideration upon which the debt contracted by the bill or note is founded, but to denote the time from which the six months are to begin to run.

The last question proposed to us is this : “ Could the Bank of *England* maintain any action against the *London Joint Stock Bank*, founded upon such transactions, under either of the states of circumstances above supposed (x) ? ” And in answer to this question, we are of opinion that an action might be maintained in either case. It has already been observed, in answer to your Lordships’ first question, that the ex-

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(x) The Lord Chancellor, in proposing this fourth question, added : “ Another question also which might be raised, and upon which we should have the opinion of the learned Judges, is, ‘ Whether what has taken place is such a violation of the Acts of Parliament as would subject the parties to a prosecution, by way of indictment ? ’ To meet those points, I propose to submit to the learned Judges a fourth question, in these words : ‘ Could the Bank of *England* maintain any action against the *London Joint Stock Bank*, founded upon such transactions ? Or would any of the parties therein be liable to be personally proceeded against by way of indictment, under either of the states of circumstances above supposed ? ’ That last question, which applies to the action and prosecution, merely states the same proposition in two ways ; it would be better to confine the last question to the liability of the parties to an action : ” [And so confined, the question was left to the Judges.]

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clusive privilege secured to the Bank of *England* by Parliament is in the nature of a right granted to them by contract, for valuable consideration. In the possession of such right they are entitled to be protected, and any infringement of such right is a private injury to that body, for which they are enabled to seek redress by action at law. Whether the right so granted be directly assailed by an act of the *London* Bank in its own name, or through the medium and intervention of another person acting at their request and by their procurement and for their benefit, if they do or cause to be done in effect (though under cover of doing something different) that which is forbidden to be done by the Act passed for the purpose of securing to the Bank of *England* the rights which they have contracted for, such banking company is, in our opinion, liable to be sued in an action on the case for an infringement of those rights. In actions for the infringement of patent rights, it is of constant recurrence that the *gravamen* is laid, not as a direct infringement, but as something amounting to a colourable evasion of the right secured to the party; and we think that the acts of the *London* Joint Stock Bank described in the foregoing questions put by your Lordships do amount to an infringement of the rights and privileges of the Bank of *England*.

The *Lord Chancellor*:—My Lords, the magnitude of the interests involved in the appeal, upon which the Lord Chief Justice has given your Lordships the benefit of the unanimous opinions of the learned Judges, is such that I cannot regret that we have had their opinions, although it did not appear to me on the argument that any difficulty was likely to arise, which would have made it necessary to have taken

the opinions of the learned Judges, assuming that the law, as laid down in the case of *The Bank of England v. Anderson*, is good law ; as to which I am very glad to find that the Lord Chief Justice has taken the opportunity of stating the opinion of the learned Judges.

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There really can be no doubt as to the proper decision of the present question ; because if these rights do belong to the Bank of *England*, established as they are and as they are asserted in the case of *The Bank of England v. Anderson*, it is quite impossible that those rights should be permitted to be destroyed by the arrangement which was resorted to in the present case. That appears to be the ground upon which the learned Judges have come to the opinion of which they have now given your Lordships the benefit. It is an opinion I entertained from the commencement of the argument ; and under those circumstances, I move your Lordships that the order of the Court below be affirmed, with costs.

Lord *Brougham* :—I entirely agree in opinion on this case with my noble and learned friend ; indeed I must say that I never have entertained any doubt upon this case, and more especially when it is placed upon the footing on which it is here put, that of adopting the case of *The Bank of England v. Anderson*, and applying the principle there laid down to the facts of this case ; and the facts in this case do not appear to me any more than to my noble and learned friend, or the learned Judges, to be different.

We must in future consider that *The Bank of England v. Anderson*, though originally a decision of only one Court, has now received the sanction of all

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the learned Judges, of whose assistance your Lordships had the benefit in this case ; and the affirmance of the judgment in this case, is in fact an affirmance of the judgment in *The Bank of England v. Anderson* : for the cases stand on precisely the same principle.

It was ordered that the appeal be dismissed, and the order therein complained of be affirmed, with costs.

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S. H. GODSON and Others - - - *Appellants.*

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The Rev. GEORGE HALL, Clerk - *Respondent.*

AN appeal was called on in its regular course ; the Appellant's counsel were not present, but he appeared in person. The House would not dismiss the appeal, but allowed it to stand over, and ordered the Appellant to pay the costs of the day.

Practice.
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A PREVIOUS case having been somewhat suddenly disposed of, this case was called on : no counsel appeared for the Appellants.

Mr. *Boteler*, for the Respondent submitted that the appeal must be dismissed ; and as the Appellants had put the Respondent to the expense of appearing, it must be dismissed with costs.

The Lord Chancellor at first intimated an intention of adopting that course.

Mr. *Godson*, for himself and the other Appellants, submitted that that course ought not to be pursued here on account of the accidental absence of counsel, whom he had instructed in the regular manner, and who had been in the House during a part of the day, but had gone away in the belief that the preceding case would occupy a considerable time. He was himself present to support his appeal, but he prayed that he might not be called on to do so in the absence of his counsel, but that time might be given.

The *Lord Chancellor* :—The Appellant must pay the costs of the day ; but as he appears himself at the bar, and the delay is not attributable to his fault, I think that in justice to him the case ought to be postponed (*a*). The Respondent will be at liberty to make any application to the House that he may think fit.

(*a*) See *Fraser v. Gordon*, *ante*, Vol. III. p. 718, and the cases cited in the note.

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ROBERT SIMPSON - - - - *Appellant.*

JAMES O'SULLIVAN, HONORA O'SUL- }
LIVAN, and JOHN KEANE - } *Respondents.*

*Life Estate.
Mortgage,
Assignment of.
Practice.*

By a settlement made on the marriage of *A.*, certain premises were assigned to trustees for his use for life, and power was also given to him "to raise by deed, mortgage, or any other writing, a sum of 1,000 *l.*, to be applied to any purpose that the said *A.* should please, but the same was not to be raised by way of sale of the said lands;" and *A.*'s wife had a jointure secured on these premises. *A.* raised the 1,000 *l.* by mortgage of the settled premises, and afterwards became bankrupt. His assignee sold his interest as such assignee in the settled premises to *B.*, who also purchased the mortgage. *A.* afterwards died.—HELD, that by this assignment of *A.*'s estate and interest in the premises, *B.* became entitled to hold the mortgage as a first charge upon the estate, as well after as before the death of *A.*, and until, by payment of principal and interest, it should be satisfied.

The Court below having directed an inquiry into the value of the estate at the time of the assignment, and the amount of *B.*'s interest therein, this House reversed the order directing such inquiry, and, without making any order, remitted the case with the declaration of what were the nature and extent of *B.*'s rights, leaving it to the Court below to carry that declaration into effect.

IN *January* 1808, *James O'Sullivan* the elder was possessed of certain lands for the residue of a term of 999 years, and on that day executed a settlement of them on the marriage of his son *James O'Sullivan* the younger, with the Respondent *Honora O'Sullivan*. The trustees of the settlement, *John Keane* and *William Ferguson*, were to hold the premises for the residue of the term on trust for *James O'Sullivan* the younger, for life, and after his death to pay 100 *l.* yearly to the said *Honora O'Sullivan* during her natural life for her jointure, and subject thereto, to the use of the issue male of the said *James* and *Honora*; and for want of such issue male, to their issue female, and for want of issue of their bodies, to the said *J. O'Sullivan*

as his absolute property. And it was by the indenture of settlement agreed that the said *James O' Sullivan* should be at liberty to raise by deed, mortgage, or any other writing, a sum of 1,000*l.* to be applied to any purpose that he should please, in case the said marriage should take effect, but that the same was not to be raised by way of sale of the said lands, tenements and hereditaments aforesaid.

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This settlement was duly registered in 1809.

By indenture of mortgage, dated 24th of *January* 1811, and made between the said *James O' Sullivan* the younger of the one part, and *Quintin Hamilton* of *Liverpool* of the other part, after reciting the said indenture of the 25th of *January* 1808, and in particular the provisions thereof whereby it was stipulated that the said sum of 1,000*l.* was not to be raised by sale of the said lands and premises; and also reciting that *J. O' Sullivan*, on the 1st of *January* then last, stood indebted to *Quintin Hamilton*, and the house trading under the firm of *Hamilton, Crowden, & Co.*, of *Liverpool*, merchants, in a sum of 1,500*l.* sterling, for money lent, advanced and paid by *Quintin Hamilton* and his house for the use of *James O' Sullivan*; and that, in order to secure the principal and interest then due, and all interest, &c. thereafter to grow due, he the said *J. O' Sullivan* had agreed with *Hamilton*, on behalf of the company, to assign to *Hamilton* the premises aforesaid, and all his estate, &c. therein by virtue of his marriage settlement or otherwise, and to assign and appoint to *Hamilton*, as a further and collateral security, the said sum of 1,000*l.*, which he had power to raise by virtue of the settlement, to be applied in part payment of the sum of 1,500*l.* and the interest, &c., and also to pass his bond, with warrant of attorney for confessing judgment thereon, to *Hamilton*,

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in the penal sum of 3,000 *l.*, conditioned for the payment of the 1,500 *l.*, with interest at 6 *l. per centum per annum*, by way of further security :—It was by the indenture witnessed, that in pursuance of the said agreement, and to carry the same into effect, *James O'Sullivan* did grant and assign to *Hamilton*, his executors, &c. the said premises, subject to redemption, &c.; and that in order the better to secure the payment of the 1,500 *l.*, and interest, &c., *James O'Sullivan*, by virtue of the power and authority by the said settlement in him vested, did grant, charge, &c., by way of mortgage, the sum of 1,000 *l.* to *Quintin Hamilton*, his executors, administrators and assigns, with such power and authority to him and them to raise and levy the same as were given and granted to *James O'Sullivan* by the said settlement, or in any other manner whatsoever; and when so raised and levied, to apply the same and every part thereof in and towards satisfaction and discharge of the said sum of 1,500 *l.*, and such interest, &c. as should at the time of such raising and levying thereof be due and owing, but subject to proviso of redemption. And it was by the said indenture provided and declared, that whensoever and as soon as the debt of 1,500 *l.*, and interest, &c. should by any means be discharged, then the said deed of mortgage, and also the bond and warrant therein mentioned, collateral therewith, should become absolutely void.

On the 1st of *February* 1817, a commission of bankrupt was awarded and issued against the said *James O'Sullivan*, and he was duly declared a bankrupt; and *Henry O'Sullivan*, of *Limerick*, was appointed sole assignee, and the estate and effects were duly conveyed to him.

On the 11th *November* 1817, *Quintin Hamilton*

presented his petition to the Lord Chancellor of *Ireland* in the matter of the said bankruptcy, praying an account of the sum due to him on the foot of said mortgage, and that the mortgaged premises might be forthwith sold before the Commissioners, for payment thereof; and praying further relief.

In this petition no mention was made of the fact that there was issue of the said marriage, by reason whereof *James O'Sullivan* had only a life interest in the mortgaged premises; nor of the proviso which declared that the said sum of 1,000*l.* should not be raised by sale of the said premises.

On the 21st of *November* 1817, the Lord Chancellor made an order on the said petition, directing the Commissioners to take the account prayed, and to sell the mortgaged premises; and also directing that all proper parties should join in executing a conveyance or conveyances thereof to the purchaser or purchasers, and that the petitioner should be paid out of the produce of such sale, in the first instance, such sum or sums of money as should appear to be due to him, together with the costs of that application and all future costs touching the same.

The Commissioners having, in obedience to the order, taken the account directed, found that there was due to *Hamilton*, on the foot of his mortgage, for principal and interest, a sum of 796*l.* 16*s.* 8*d.*, up to and for the 31st day of *December* 1816; and the mortgaged premises having been set up on the 27th of *April* 1818, for sale by public auction, at the Royal Exchange in the city of *Dublin*, the Appellant (who was himself a partner in the House of *Robert Hamilton & Company*, who were the solicitors of *Quintin Hamilton* the mortgagee, and who as such solicitors procured the order to sell the said lands in the bankruptcy matter)

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bid a sum of 850*l.* for the same, and was declared the purchaser thereof at that price.

The rental of the premises was at that time 263*l.* 13*s.* *Irish* currency. On the 7th of *October* 1818, an assignment to the Appellant, as purchaser, was duly executed by *Henry O'Sullivan* and *Quintin Hamilton*, according to their respective interests.

The Appellant, shortly after the execution of the said deed of the 7th of *October* 1818, entered into possession or receipt of the rents of the premises thereby assigned to him, and has ever since continued in such possession or receipt.

In *August* 1836 *James O'Sullivan* died, leaving his eldest son, the Respondent, who claims to be entitled to the premises under the marriage settlement of his father, and insists that the Appellant's interest as assignee of the life estate of *James O'Sullivan* determined on his death; and that such sum, if any, as he was entitled to, in respect of the said charge or sum of 1,000*l.*, has been paid off by perception of the rents and profits of the said premises, and that the Appellant was bound to have applied the said rents and profits for that purpose.

The Respondent, *James O'Sullivan*, brought an ejectment in *Hilary* term 1837; and in *February* 1837 the Appellant filed his bill in the Court of Chancery in *Ireland*, in which he alleged that the proviso for redemption in the indenture of mortgage of the 24th *January* 1811 contained, and all equity arising thereunder, had been for ever barred and foreclosed by the several proceedings had in the matter of the bankruptcy, and that all right, &c. to such proviso and equity of redemption, if any, became vested in *Henry O'Sullivan*, as assignee, and was by him legally and properly assigned to the Appellant by the

indenture of the 7th *October* 1818 and that the Appellant was then entitled to have any estate which might be outstanding in the trustees, or in the Respondent *James O'Sullivan*, absolutely assigned to him ; or that the Appellant was entitled to the sum of 1,000*l.*, and interest at 6*l.* per cent. thereon since the time of the death of *James O'Sullivan* ; and that the same was a good, valid, and subsisting charge affecting the premises. The bill contained a prayer for relief, framed in accordance with these statements.

The several defendants put in their answers, alleging, among other things, that the order made in the matter of the bankruptcy had been fraudulently obtained, by the suppression of the fact that the mortgagor was only tenant for life, and that the premises could not be sold. The defendants further alleged, that the indenture of the 24th *January* 1811 operated only as a mortgage of the life estate of *James O'Sullivan*, with an appointment of the sum of 1,000*l.*, which sum could only be levied out of the rents and profits, and not by way of sale : that the proper parties had not appeared before the Commissioners, so as to enable them properly to take the accounts : that all that could be purchased by the Appellant at the sale was the life estate of *James O'Sullivan*, and the charge of 1,000*l.* thereon : that the Court possessed no jurisdiction to foreclose the equity of redemption, and that the sale of the premises was utterly void as against the Respondent *James O'Sullivan* ; they denied that the Appellant ought to be considered as a purchaser thereof for full and valuable consideration, the Appellant's purchase-money not exceeding four and a half years' purchase of the said premises, and submitted that the Appellant ought to be charged as mortgagee in pos-

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session ; and that on a fair account taken between the parties, it would appear that all the sums due to *Quintin Hamilton* or to the Appellant on the foot of the mortgage debt, had long since been paid off and discharged by the perception of the rents and profits ; and that *James O'Sullivan* was entitled to hold the premises subject only to the 100*l.* a year jointure, and altogether discharged from the mortgage.

Issue having been joined and witnesses examined, the cause came on to be heard before the Lord High Chancellor of *Ireland* on the 1st of *June* 1838, upon the pleadings and proofs ; whereupon the Appellant abandoned his claim to be considered entitled absolutely to the said premises for the residue of the said term of 999 years, but insisted that he was at all events entitled to a sum of 1,000*l.*, as a charge upon the said mortgaged premises. The Lord Chancellor directed an inquiry as to the annual value of the said premises, and as to the value of the life-estate of the said *James O'Sullivan* the younger therein ; and accordingly made a decretal order, whereby it was referred to the Master to inquire and report what was the annual value of the lands, tenements and hereditaments comprised in and conveyed to the Appellant by the deed of assignment dated the 7th *October* 1818, at the time of the sale thereof to the Appellant, and what was the value of the life interest of the said *James O'Sullivan* the bankrupt therein at the time of such sale, having regard to the situation thereof at that time with respect to the deeds of the 25th day of *January* 1808, and 24th day of *January* 1811 ; and further directions were reserved.

This was the order appealed against.

Mr. *Pemberton* and Mr. *H. R. Reynolds*, for the Appellant :—The question here is, whether a tenant

for life, with a power to charge the premises with a sum of 1,000*l.*, is to charge it only on his own life interest. The inquiry directed by the Court below is altogether improper. It is an immaterial inquiry, and it is impossible to see how, with reference to the rights of these parties, it could become of importance. The tenant in tail, who now sets up his claim against the rights of the mortgagee, has no interest in the question, whether the sale effected under the bankruptcy of the tenant for life was for the full value of the premises or not. That question was only of importance to the assignee of the bankrupt, for whose benefit, as representing the creditors, the sale was effected. But the assignee raises no question on the matter. There cannot be a dispute that the Appellant is entitled to a decree for raising the sum of 1,000*l.*; not by sale indeed, for the settlement provides that there shall be no sale of the premises, but there may be a mortgage. The Appellant is clearly entitled to have this sum raised, and to have an assignment of the premises by way of mortgage, executed for that purpose. The tenant for life had a clear power of charging the estate with the sum of 1,000*l.* It would be absurd to declare that a tenant for life had a power to charge the estate with a sum of money, and yet to say that his power could only effectuate the charge during the continuance of his own estate. The charge continues till it is satisfied, and from the death of the tenant for life the Appellant is entitled to be considered as the mortgagee in possession until the mortgage has been satisfied. The whole of the transaction taken together amounts to an assignment of the *corpus* of the estate for the purposes of the charge. It is clear, therefore, that the inquiry directed was altogether beside the case, and the decree must consequently be reversed.

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Mr. *Knight Bruce* and Mr. *Wakefield*, for the Respondents:—It may be doubtful here whether the proceedings are not altogether void for want of parties, and whether the Court can proceed in the absence of the assignee. The question here is, what is the meaning of this power. It may be to give the bankrupt power to raise money to the amount of 1,000*l.*, making the estate liable to the payment of it. That would be to make the estate a surety for the loan: but the estate was in the first instance to be liable to the widow's claim for jointure. The object of the jointure was to bar the widow's claim to dower; but it was also to secure to the widow for life a provision that was to become payable instantly on the death of the husband. To give the charge the effect now contended for, would be to defeat this object. There cannot be a sale of the premises under any circumstances; first, because it is expressly forbidden in the creation of the power itself, and next because it would defeat the widow's right to jointure, which it was a primary object to preserve. The appointee of the 1,000*l.* would of course have a right to the interest; but the manifest intention of the parties was, that the right to the jointure should precede any payment to be made under the power creating the charge of 1,000*l.* Under all the circumstances, it is clear that the Appellant is only in the situation of a mortgagee in possession. From the time of the death of the tenant for life the decree would simply be against the tenant in tail for the payment of the interest; but the terms of the power to create the mortgage not giving the power to sell in order to satisfy the mortgage, the mortgagee or his assignee can only be entitled to payment out of the rents of the estate, but cannot take the estate itself; and such payment itself must be made

after, and be held dependent upon, the superior claim of the jointure.

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Lord Chancellor:—My Lords, I do not feel that it is necessary to call upon the learned counsel for the Appellant to reply. I think as the matter now stands there is an end of this inquiry. It is clear that the Respondents in this case can have nothing to do with any question which they imagine may be raised as to the price paid as between the vendor and the person who has purchased this property. There was an assignment in 1818 of a reversionary interest which did not fall into possession till 1836. The tenant for life of the property in question had the power of raising 1,000*l.* chargeable upon it. He did so ; and though he was bound to keep down the interest, yet the debt was a charge on the estate. The tenant for life became bankrupt, and the party now plaintiff claims from the assignees of that bankrupt all the interest which they acquired under the bankruptcy, as well as the reversionary interest of the bankrupt himself; and from the person who was then in possession the benefit of that mortgage of 1,000*l.*, as he had in fact bought the interests of both the parties ; he therefore became entitled by his purchase to the estate for life of the bankrupt, and to whatever interest the bankrupt had created under this charge of 1,000*l.* to be enjoyed by anybody who had made it the subject of purchase, and which enjoyment he had a right to enforce against any subsequent charge. Whether he gave too little or whether he gave too much for the purchase of that 1,000*l.* is a matter of perfect indifference to the Respondents, the parties who now represent the inheritance. They are not persons who can be prejudiced by the purchaser having given an inadequate sum for it, or

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purchased it under circumstances which would entitle a party really interested in that question to set it aside. The Respondents have no right to come before the Court for any such purpose, and why should they? Nor is it necessary that the assignee of the bankrupt should be a party to that suit. What does it signify whether the assignee of the bankrupt has anything to say against that transaction as a sale for less than the proper value? So long as it remains unimpeached on any other ground, the plaintiff is entitled to all the advantages which can be denied from that purchase. It is as if a party had purchased the right of a ground landlord, where it is clear that the tenant under him could not say, "you bought the farm or the estate at too low a price, and therefore I will not pay you the quit rent." That really is the situation of these parties; and therefore the Appellant having become entitled to whatever belonged to the tenant for life, whether incidentally or otherwise, there cannot be a question that he is entitled to recover it in respect of this purchase.

It remains therefore to be considered what title the Appellant acquired to that 1,000*l.* The settlement certainly is very inartificially framed, but I cannot conceive that there can be a doubt as to his having acquired an interest in that 1,000*l.*, the power of creating which was under the settlement incident to the tenant for life, as appears from passages to be found in different parts of the deed. It is incident to the tenant for life, because it was a power to be executed by the tenant for life; he was tenant for life with the power of raising by mortgage the sum of 1,000*l.* out of the estate, and I do not see any ground on which it can be said that this was intended to be a restricted power, as the provision is that he shall be at liberty to raise by deed, mortgage, or by any other writing, the sum

of 1,000 *l.* to be applied to any purposes he shall please. This power to raise by mortgage 1,000 *l.* to be applied to any purposes he might please, was in addition to the value of the life estate he acquired. The jointure of course would come into operation only after the expiration of the life estate. It is not to be supposed to have been intended that if he raised the 1,000 *l.* the mortgagee was to be deprived of his interest, though the estate produced enough to raise that interest and also the 1,000 *l.* It is not consistent with the practice of your Lordships' House to declare so much as to give an opinion beyond the immediate question under discussion and necessary to be decided ; but as the question has been somewhat raised, I will say that I do not feel any doubt that that 1,000 *l.* when raised was to be a charge upon the estate from the period when it was raised, the interest to be paid by the tenant for life, and the party who lent the money to be the first person who had a charge upon the estate after the expiration of the tenancy for life.

My Lords, the Court below, under some misapprehension probably of the relative situation of these parties and their respective rights, has declined to make a decree for raising that 1,000 *l.* from the produce of the estate, and has directed an inquiry and report as to " what was the annual value of the lands, tenements and hereditaments comprised in and conveyed to the Appellant by the deed of assignment dated 7th *October* 1818, at the time of the sale thereof to the Appellant, and what was the value at such time of the life interest of the said *James O' Sullivan*, the bankrupt, therein, at the time of such sale, having regard to the situation thereof at that time with respect to the deeds of the 25th day of *January* 1808." Now it is obvious that the effect of that direction is erroneous ; it has no reference to what it is to be adjudicated between the plaintiff and

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the defendant ; and whatever may be the result of that inquiry, whatever the Court may do upon it, it leaves the question between the plaintiff and the defendant where it was. That must have arisen from some misapprehension as to the situation in which those parties stood with regard to each other. It is clear therefore that that decree must be reversed. Your Lordships have before you a case in which the Court below, from a misapprehension of the course to be pursued, has directed an inquiry which does not touch any questions existing between the parties. It is the duty of this House, therefore, to remove that impediment by an assertion of the plaintiff's rights ; and I apprehend that your Lordships, seeing that no decree has been made by the Court such as ought to have been made, that the real question has not been entertained, will think that the proper course will be to declare the right, and then to leave the mode in which that right is to be enforced to the judgment of the Court below. I apprehend the order of this House, consistently with the practice, will be to reverse the decree below, and to declare that the plaintiff is entitled, by virtue of the assignment of the 7th of *October* 1818, to the benefit of the charge created by the deed of the 24th of *January* 1811 ; and with this declaration remit the cause, leaving to the Court below to make such decree as may be just and consistent with that declaration. That declaration will establish the plaintiff's title to the charge ; the mode in which it is to be raised, and the detail, will remain to be considered by the Court below, having the benefit of your Lordships' declaration as to the plaintiff's right, and leaving the question open as to other matters. I do not know very well how that question with regard to the jointure could be declared ; at the same time I have not much doubt about it. It is raised in the pleadings, I think, by

the answer. Perhaps it might save the possibility of another appeal to declare the title, but there is a difficulty in doing it.

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Mr. *Knight Bruce* suggested that there should be some words of exclusion to show what their Lordships considered the party really entitled to, and to mark their opinion that he was only entitled to interest from the time of the death. He also suggested, that if the words were “ became entitled,” instead of “ is entitled,” it might more clearly mark their Lordships’ opinion, because the rents he had received, or which without his wilful default might have been received, since the time of the death, might by possibility absorb the charge altogether.

Lord Chancellor :—That is a subject which can be disposed of only on a regular hearing, which has never been had. I apprehend the rule of the House to be this : that where the Court below has miscarried, the House of course reverses what is done, and makes a sufficient declaration to prevent that error being again committed, but does not interfere further. I apprehend the declaration I have stated, with the words “ became entitled,” instead of “ is entitled,” will be sufficient to meet the case. I therefore move your Lordships to reverse the decree, and declare that the plaintiff became entitled, by virtue of the assignment of the 7th of *October* 1818, to the sum of 1,000*l.*, under the deed of 24th *January* 1811, in addition to the life interest of the bankrupt, *James O’Sullivan* ; and with this declaration, to remit the case to the Court below.

Ordered and declared accordingly.

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July 27, 28. JOHN THOMSON, Clerk to the General }
Commissioners of Police in *Edinburgh* } *Appellant.*

JAMES MITCHELL - - - - - *Respondent.*

Public Officers. THE *Edinburgh* Police Act, 2 W. 4, c. 87, does not make the Com-
Practice. missioners responsible, through their collector, for the miscon-
Costs. duct of one of the police constables.

Where an interlocutor of the Lord Ordinary was appealed against, and overruled in the Court of Session, but the decree of that Court was afterwards reversed in this House, the House gave the Appellant the costs incurred by him in the Court of Session.

THIS was an appeal against a decree of the Court of Session, reversing in part an interlocutor of Lord *Fullerton*, in an action in which the present Respondent was pursuer, and the present Appellant, Mr. *James Stuart*, and *Eric Mackay*, were defenders. The facts of the case were these: On the night of the 30th of *November* 1836, *Mitchell*, accompanied by his wife, and a friend named *Henderson*, were going along *North St. Andrew-street*, in *Edinburgh*, when, as he stated, he fell by accident from the slippery state of the streets. *Eric Mackay*, one of the night watch, came up and accused the whole party with being drunk and disorderly. A contention arose upon this, and *Mackay* having called others of the night watch to his assistance, *Mitchell* and his wife, and *Henderson*, were all taken into custody. In going to the place of detention, *Mitchell*'s leg was hurt,—as he alleged, in consequence of a blow given by *Mackay*'s baton; but as *Mackay* alleged, in consequence of his falling to the ground through his drunken and excited state. *Mitchell* was taken to the infirmary, and was found to be permanently injured in the knee

joint. He afterwards instituted a suit against the present Appellant, clerk to the Commissioners, *James Stuart*, superintendent of the *Edinburgh* police, and against *Mackay*, the watchman, by whom he alleged the assault to have been committed. He founded his suit on the *Edinburgh* Police Act, 2 *W.* 4, c. 87, s. 18(a). The three Defenders pleaded separately. Mr. *Thomson* pleaded, 1st, that the action was not sustainable against him as representing the Commissioners, inasmuch as the act complained of was not alleged to have been done or ordered by them; 2dly, that they were not liable for the acts of the inferior officers of the establishment, whom they did not appoint; and 3dly, that as Commissioners they had no funds under their control which could be made answerable for the wrongful acts of the inferior officers. Mr. *Stuart*

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(a) By which it is enacted, "that the said general commissioners may sue or be sued for anything done or ordered by them in virtue of this Act, and for recovery of the penalties or forfeitures before mentioned, in the name of their clerk, collector, or treasurer, for the time being." By the statute in question, the commissioners are authorized to assess the inhabitants, and apply the monies raised for the purposes of the statutes; to appoint treasurers, clerks, and surveyors, being the officers employed in the financial department of the establishment; to fix generally the number of officers to be employed in every department; to make regulations relative to the lighting, cleaning, and watching of the streets of the city, and for abating nuisances, and removing obstructions on the same, by enacting and enforcing penalties. They have also the privilege of suing and being sued, in name of their clerk, for anything done or ordered by them in the exercise of these powers, or performance of these duties. The appointment and dismissal of the officers of the police are regulated by the 3 *Geo.* 4, c. 78. The judge of police is nominated by statute, the superintendent is appointed by the Lord Provost of the city and Sheriff-depute of the county of *Edinburgh*, or in the event of their not agreeing as to a fit person, by the Lord Advocate for the time being. The Lord Provost and Sheriff have full power at all times to remove the superintendent at their pleasure. The superintendent has the absolute power of appointing and removing at will the watchmen and other officers of the department acting under his orders; so that (s. 65) in as far as possible he may be made answerable for the conduct of these parties.

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pleaded, 1st, that there were no personal conclusions against him in the libel, and that the statute libelled did not authorize the Commissioners to sue or be sued in the name of their superintendent, and, 2dly, that in no case could he be personally liable for a delict said to have been committed by an inferior officer, not in discharge, but in violation of his duty. The defendant *Mackay* pleaded to the suit on the merits.

The case, on the preliminary defences of *Thomson* and *Stuart*, was brought before Lord *Fullerton*, as Lord Ordinary; and on the 11th of *July* 1837, his Lordship pronounced an interlocutor, by which he dismissed the action against *Thomson* and *Stuart*, being of opinion that nothing complained of was shown to have been “done or ordered by the Commissioners,” so as to make them liable, through their clerk, and that *Stuart*, their superintendent, was at all events a person against whom such an action could not be brought unless personal misconduct was charged against him. The pursuer appealed to the First Division of the Court of Session against this interlocutor, which their Lordships affirmed so far as *Stuart* was concerned, but recalled it with respect to *Thomson*, whom, as representing the Commissioners, they held liable to the action. This was an appeal by *Thomson* against that part of their Lordships’ decree.

The *Attorney-general* and the *Lord Advocate*, for the Appellant:—The part of the decree appealed against cannot be supported; for it proceeds on the assumption of the liability of the Commissioners for all the acts of the police officers, while the statute which creates the office of the Commissioners only makes them responsible, through their clerk, for anything “done, or ordered to be done, by them.” The

apprehension of *Mitchell* by *Mackay* was not an act done or ordered by them. It does not therefore fall within the description of cases to which the Commissioners' liability is by the express terms of the statute restricted. The Commissioners have no funds provided to meet demands of this sort. In the argument in the Court below, the 33d section of one of the *Edinburgh Police Acts* (3 *Geo.* 4, c. 78) was relied on by the Respondent, as giving rise to the argument that the police funds were appropriated for such a purpose. But the Respondent relied for this purpose on one phrase alone, which will by no means bear the construction sought to be put upon it. The 33d section of the Act declares that the sums to be assessed on the inhabitants for the support of the police, "under the several heads of collectors, surveyors, and clerk's salaries, and incidental expenses," shall be divided into such proportions, &c. The words relied on are "incidental expenses." They certainly will not include damages given on account of the misconduct of any of the inferior officers. It is clear, therefore, that neither making any direct enactment for the liability of the Commissioners in a case like the present, nor providing them with any funds to meet it, the Legislature did not intend that it should be incurred. There is no head of assessment in the statute under which such damages could be paid. Nor in making their estimate of the sum to be assessed is there anything requiring them to form an estimate of the probable sum likely to be wanted for such a purpose. On the contrary, section 33 goes on to declare, that the sums assessed for "salaries and incidental expenses" shall be divided in proportions "among the three heads of lighting, cleansing, and watching;" and the receipts are to show how much

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is levied in respect of each. This circumstance alone excludes the possibility of the argument that damages for the misconduct of the police officers were intended to be provided for out of the funds furnished to the Commissioners. The 56th section of the same statute directs the application of these monies "according to the annual estimates required, as before specified, and for no other purpose whatever;" and the 57th section contains a penalty for the misapplication of the money. In no way whatever does the statute fix any direct liability on these Commissioners; and as to the imposition of an indirect liability, the construction which this and similar Acts are to receive, the principle laid down by this House in *Duncan v. Findlater*(b), in the course of the last session, is conclusive. There it was held, upon arguments similar to those now addressed to the House in support of this appeal, that the trustees under a Road Act were not responsible for an injury occasioned by the negligence of the men employed in making or repairing the road, they not being in the situation of servants to the trustees. Before the time when this House pronounced that decision, Lord *Moncrieff*, in a case of *Smith v. The Edinburgh Police Commissioners*(c), had expressed a very strong opinion to the same effect. The present decree is therefore not warranted either by the precedents of the Court below, or by the high authority of this House.

No counsel appeared on the part of the Respondent.

The *Lord Chancellor*:—Your Lordships have not had the advantage of hearing counsel in support of the

(b) *Ante*, Vol. VI. p. 894, and (c) In 1836.
 1 M'Lell. & Rob. 911.

decision of the Court below. I confess that at present I do not well see how that decision is to be maintained, nor how this case is to be distinguished from that of *Duncan v. Findlater*. But not having had the advantage of hearing counsel in support of the decree appealed against, I should wish, before advising your Lordships on this appeal, to look into the case, and to examine the arguments and the decision in the case that has been cited.

Judgment postponed.

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The *Lord Chancellor* :—My Lords, in this cause, which was heard before your Lordships yesterday, I have taken an opportunity of looking into the case and also of referring to the report of the decision of this House in the case of *Duncan v. Findlater*, and it certainly does appear that the principle established by that decision applies in all respects to the present question. But there are in this case circumstances arising out of the provisions of the Police Acts, which make it still more clear that the judgment of the Court below ought to be reversed. It appears, in the first place, that the watchman, who actually committed the alleged injury, was not appointed by the Commissioners, against whose clerk the action is brought. Their duty certainly is to provide funds, but the individual who committed the injury was not in any sense their agent. There is also a difficulty arising from the 18th section of the Act, which provides that they shall only be sued in name of their clerk, unless in respect of some act done or ordered by them. These are the circumstances which distinguish this case, even if the judgment below were not met by the judgment in *Duncan v. Findlater*. I find that the

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circumstance of this case having been heard *ex parte*, is not attributable, as was stated from the bar, to that judgment of this House last session ; for I find, in the observations I made to this House on that occasion, that I had my attention drawn to the dependence of the present case, and being informed that this case would raise the same question, I inquired how that matter stood, thinking it probable that the House might feel it right to have this case heard before deciding *Duncan v. Findlater* ; but I then found that the present case had been set down *ex parte*, and therefore it was not to be expected the House would derive much information from the discussion of it. It was set down *ex parte* therefore before the parties were aware what course the House would adopt in the case of *Duncan v. Findlater*. I have much satisfaction in finding that the decision this House has come to has the sanction of Lord *Moncrieff*, who expressed a similar opinion to that entertained in this House at a period before the question was first discussed at your Lordships' bar ; for I find that in *January* 1836, Lord *Moncrieff*, in the case of the Commissioners of Police, at the suit of *Smith*, founded on by the Appellant, pronounced a decree consistent with the principle adopted by your Lordships in *Duncan v. Findlater* ; and in this case itself Lord *Fullerton* expressed a similar opinion. There was not, therefore, that unanimity among the Judges in the Court of Session which might seem to exist when the case was disposed of by the Inner House ; for we have the authority of those two learned Judges, who, at periods before this question was discussed in this House, had expressed opinions contrary to that of the Inner House, and in conformity with the principle ultimately sanctioned in this House. I shall therefore advise your

Lordships to reverse the judgment of the Court of Session.

Decree reversed.

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The *Attorney-general*:—The Inner House reserved the question of costs. The Appellants do not ask for the costs of the appeal, but they are at least entitled to the costs of the appeal from the Lord Ordinary to the Inner House, wherein they were supporting a judgment which this House has now declared to be correct.

The *Lord Chancellor*:—This House ought now to make such an order as the Inner House would have made, had its decision been well founded in principle.

It was ordered and adjudged, “That the interlocutor appealed from be reversed; and that the said *James Mitchell* do pay to the said *John Thomson*, or to the clerk for the time being of the General Commissioners of Police for the city of *Edinburgh*, all the costs incurred in the Court of Session, as well before the Lord Ordinary as before the Inner House, by the said *John Thomson*, as representing the said Commissioners of Police, in defending the said action. And that, with this order, the cause be remitted.”

Lords' Journals for 1840, p. 561.

1837 :
June 27.

LAWRENCE GWYNNE - - - *Plaintiff in Error.*

1840 :
July 28.

JOHN BURNELL and JOSEPH }
MERCERON - - - - } *Defendants in Error.*

Bond.
Land-tax
Collector.
Surety.
Pleading.
Practice.

THE bond given by a collector and his sureties to the Commissioners of Land and Assessed Taxes under the 43 *Geo.* 3, c. 99, is broken if the taxes collected in any one year are not duly paid up by the collector to the account of that year.

The breach of the condition of the bond is equally complete, and the sureties are equally liable, though all the monies collected in the year for which they are sureties should be in fact paid in, if any part of them should be appropriated by the collector, and received by the Commissioners, in satisfaction of the arrears of a former year.

Such appropriation of part of the monies of one year to the payment of the arrears of a former year, will not prevent the Commissioners from maintaining an action on the bond against the sureties for the year in which the money collected has been so misappropriated.

The Commissioners may come upon the sureties after they have sold the lands and goods of the collector, but the seizure and sale of his lands and goods is a condition precedent to their right of action against the sureties, and they are not entitled to require notice of such lands and goods in order to perform the condition.

The plea of the Defendant (a surety in the bond) averred that the collector had lands and goods, of which the Commissioners had notice, and that they did not seize and sell. The replication was, that the collector had no property subject to seizure and sale, of which the Commissioners had notice; the rejoinder was, that the collector had lands and goods which might have been seized and sold, but were not *modo et forma*, as alleged by the plaintiffs, concluding to the country. The rejoinder did not say anything of notice. The verdict was, that the collector had lands and goods which might have been seized and sold, but that the Commissioners had no notice of the collector's lands, but had reasonable grounds for believing that he had goods.—HELD, that there could be no judgment for the Defendant on these pleadings, nor any judgment for the Plaintiffs, *non obstante veredicto*, but only a *venire de novo*.

The Court below, in which an action is brought, may award a repleader; but a Court of Error cannot award it.

THE Defendants in Error, together with one *Collins* (since deceased), were the obligees in a joint and

several bond given to them as Commissioners of Land and Assessed Taxes for the *Tower* division, in the county of *Middlesex*, by the Plaintiff in Error, one of the sureties of *Richard Bigg*, a collector of the assessed taxes for the parish of *St. Matthew, Bethnal Green*, for one year, ending the 5th day of *April* 1829. They brought their action in the Court of Common Pleas at *Westminster*, to recover of the Defendant (now the Plaintiff in Error) the sum of 699 *l.* 3 *s.* 2 *d.*, being monies received by *Bigg* as such collector, and not paid or accounted for by him pursuant to the Acts of Parliament relating to those duties.

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The following pleas were put on the record :

First :—*Non est factum*, on which issue was joined.

Second :—Performance on the part of *Bigg*, the collector. To this plea the Plaintiffs, in their replication, assigned several breaches, the third of which was, that *Bigg* had not duly paid over to the Receiver-general the monies received by him as collector of the assessed taxes, in respect of the rates and assessments mentioned in the condition ; viz. for the year 1828, ending the 5th day of *April* 1829. On this an issue was taken by the Defendant in his rejoinder.

Third :—That the bond was obtained by a fraudulent representation by the Plaintiffs, or others in collusion with them, that *Bigg* had well and faithfully collected all sums of money, which he under and on account of former appointments was authorized and required to collect, and had well and truly paid and accounted for the same ; whereas said *Bigg* was indebted in a large sum of money, for monies received by him under former appointments, and had not paid or accounted for the same, by which false repre-

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sentation the defendant was induced to execute the bond.

The fourth plea imputed fraud generally. Issues were taken on the third and fourth pleas.

The fifth plea alleged that *Bigg*, previous to bringing the action, and after he had made default in payment of the monies collected, was possessed of and entitled to divers lands, goods, and chattels, of great value, as of his own property, within the jurisdiction of the Commissioners, of which the Defendants in Error had notice, and which lands, goods, and chattels might have been seized and sold in pursuance of the directions and powers given to the Commissioners, but which continued unsold. To this plea the Plaintiffs replied, that after *Bigg* had collected and received the assessments, and had neglected to pay the monies so collected and received, he had no lands within the jurisdiction of the Commissioners which they could seize and sell, of which they had notice, and that all the goods and chattels of *Bigg* within their jurisdiction, of which they had notice, were seized and sold under a warrant of the Commissioners, and applied towards the satisfaction of the sums collected, and there remained a large sum unpaid, and there were not any other goods and chattels of *Bigg* of which they had notice. The Defendant rejoined, that *Bigg* had divers lands, goods, and chattels within the jurisdiction of the Commissioners, which might and ought to have been discovered and found, but which were not seized and sold, and tendered an issue thereon, in which Defendants in Error joined.

The sixth was a similar plea to the preceding, except alleging possession by *Bigg* of goods and

chattels only. Replication and rejoinder similar to the last.

The seventh plea alleged that *Bigg* was possessed of goods and chattels of great value within the jurisdiction of the Commissioners, which they might have seized and sold, and which were sufficient to satisfy all the debts and deficiencies of *Bigg*. The replication and rejoinder to this plea were similar to the preceding. The 8th, 9th, 10th, 11th, and 12th pleas in like manner set up the laches of the Commissioners as an answer to the action. Issues were taken thereon. The 13th and 14th pleas, which denied that the Commissioners were damnified, except by their own wrong, were demurred to, and judgment given for the demurrer.

The action came on for trial at the Guildhall of the City of *London*, before Mr. Justice *Alderson*, at the sittings after Trinity Term 1831, when the execution of the bond by Mr. *Gwynne* was admitted. Evidence was then given on behalf of the Commissioners; and the following facts were found by the jury, in reply to questions in writing submitted to them by the learned Judge.

First:—That *Richard Bigg* paid over to the Receiver-general all the sums received by him for the assessments for the year 1828–9.

Second:—That he did not pay all those sums to the service of the year 1828–9, and that the sum of 2,430 *l.* was paid to the service of that year, and 693 *l.* to that of former years.

Third:—That *Richard Bigg* had lands or houses, after the default, of the value of 121 *l.*, which could have been seized or sold.

Fourth:—That he had goods in like manner, of

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the value of 200 *l.*, at the time of default, which could have been seized and sold.

Fifth:—That the Commissioners had not notice of the possession of houses or lands on the part of *Richard Bigg*, but that they had reasonable grounds for believing that he possessed household goods at the time of the default.

Sixth:—That he absconded.

Seventh:—That no fraudulent misrepresentation was made to Dr. *Gwynne* by the Commissioners to induce him to execute the bond.

The facts were afterwards turned into a special case, which was argued before the Court of Common Pleas. The Court thought the provisions of the Act requiring the Commissioners to examine *Bigg*, and hasten the payments, was directory only, and therefore that such conduct was not a condition precedent to the Plaintiffs' recovery, and accordingly directed judgment to be entered up for the Plaintiffs, on the issues raised on the 8th and 11th pleas *non obstante veredicto*. The Court thought the appropriation of one year's receipts to the service of a former year was not "a due payment" within the meaning of the condition, and accordingly gave judgment on the second plea for the Plaintiffs. The Court thought the sale of the collector's lands and goods could only form a condition precedent to the right to put the bond in suit against the surety, where the existence of such property was known to the Commissioners at the time of the action; and accordingly entered up judgment for the Plaintiffs on the 5th, 6th, and 12th pleas.

Upon the above judgment, given in Hilary Term 1833 (*a*), a writ of error was brought in the Exchequer

(*a*) 9 Bing. 544; 2 Moore & Scott, 640, nom. *Collins v. Gwynne*.

Chamber, which writ of error was argued before seven of the Judges; and in Trinity Term 1835 the Judges in the Court of Error delivered their opinions *seriatim* (b). On all the issues, except on the 12th, 13th, and last issues, viz. those raised on the 5th, 6th, and 12th pleas, the Court held that the judgment of the Court below ought to be affirmed. But on such 12th, 13th, and last issues, a majority of the Judges held that the judgment of the Court below should be reversed on those issues, the verdict upon those issues being for the Defendant below; but that notwithstanding such verdict, a judgment of *non obstante veredicto* should be entered for Plaintiffs below on these issues. Three of the Judges held that the sale of the lands and goods was a condition precedent to the right of putting the bond in suit against the surety; two of the other Judges held it was a condition precedent, but only after notice; and the other two Judges held it was not a condition precedent at all, even with notice. Upon this judgment a writ of error was brought by the Plaintiff in Error to this House (c).

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(b) 2 Bing. N. C. 7; 2 Scott, 16, nom. *Gwynne v. Burnell*.

(c) The sections of the 43 Geo. 3, c. 99, chiefly in discussion, were the following:—

S. 13.—And every such bond given by way of such security as aforesaid, shall be prosecuted by such commissioners on any failure or default of the said collector or collectors: provided always, that no such bond shall be put in suit against any surety or sureties for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collector or collectors in pursuance and by virtue of the directions and powers given to the respective commissioners by this Act.

By s. 15, the appointment of collectors within the bills of mortality shall belong to the resident commissioners.

S. 49.—And be it further enacted, that the receivers-general, their deputy or deputies, are hereby empowered and required to call upon and hasten the collectors to make the payments of all sums received by them of such duties as aforesaid; and in default of such payment, to cause the same to be levied, by warrant under the hands and seals of any two or more of such commissioners, upon the collectors, by dis-

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Sir *W. Follett*, for the Plaintiff in Error:—The first question here is, whether there has been any breach of this bond, so far as Mr. *Gwynne*, the Plaintiff in Error, is concerned? That question must be answered in the negative. The office of collector is an annual office, and the liability of the sureties must be annual also, and that liability must be strictly confined to the year for which it is incurred. The Plaintiff in Error was surety only from *April* 1828 to *April*

tress and sale of his or their goods and chattels, such sum and sums of money as he or they hath or have received, and as ought by him or them to have been paid, and is not paid.

S. 52.—And be it further enacted, that if any such collector or collectors shall neglect or refuse to pay any sum or sums of money which shall be by him or them received as aforesaid as in and by this Act is directed, and shall detain in his or their hands any money received by them or any of them, and not pay the same at such time as by this Act is directed, or shall have wilfully refused to give an account to such commissioners as aforesaid of the sums by him or them collected in manner before directed, the said respective commissioners, or any two or more of them, in their respective jurisdiction, are hereby authorized and empowered to imprison the person and seize and secure the estate, as well freehold as copyhold, and all other estate, both real and personal, of such collector or collectors to him or them belonging, or which shall descend or come into the hands or possession of them or their heirs, executors, or administrators, wheresoever the same can be discovered and found; and such commissioners who shall so seize and secure the estate of any collector or collectors shall, and are hereby empowered to appoint a time for a meeting of the commissioners for such division, &c. and there to cause public notice to be given of the place where such meeting shall be appointed, ten days at least before such meeting; and the commissioners present at such meeting, or the major part of them, in case the accounts of such collector be not duly delivered, or the monies detained by any such collector be not paid or satisfied, as ought to be done according to the directions of this Act, shall be and are hereby empowered and required to sell and dispose of all such estates which shall for the cause aforesaid be seized and secured, or any part of them, to satisfy and pay into the hands of the receiver-general the sum that shall not be so accounted for or shall be so detained in the hands of such collector or collectors, their heirs, executors, &c. respectively, together with the reasonable costs and charges of recovering, raising, and paying the same, which costs and charges shall be ascertained and settled by the said commissioners, and the overplus (if any) shall be restored to the person who owned the estate before the sale thereof.

1829, and his liability cannot be extended over any other years. It does not appear that he knew *Bigg* to have been the collector before that time. But, in fact, *Bigg* had been collector, and had before then made default. Enough was collected by *Bigg*, and paid in by him during that year, to exempt the Plaintiff from any liability in respect of his bond; and *Bigg* could not, by paying in, nor could the Commissioners, by receiving payment of sums collected in that year, but assigned by the direction of *Bigg* to the account of a different year, impose upon the surety a liability which he had never undertaken to incur. Without knowledge of a previous default on the part of *Bigg* being proved against the surety, he cannot be held liable for such default. Now the money collected in the year for which the Plaintiff in Error was surety has been actually paid, but the Commissioners have thought fit to receive it as paid for the service of a former year. They had no right, by a proceeding of this sort, to fix on the surety this liability. *Peppin v. Cooper* (d) shows that a bond given under this Act is a bond given in respect of an annual office. That was a case on this very statute, and there it was held that the office of collector was an annual office; and therefore, when a bond, after reciting the appointment of *H. W.* to be collector under the Tax Act, was conditioned by him for the due collection of the rates and duties at all times thereafter, that bond was duly complied with by the due collection of the rates for one year. Such being the construction of the Act, it is clear that the surety was only bound to see that the money was collected for the year for which his bond was given. It was so collected here, and the amount

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(d) 2 Barn. & Ald. 431.

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collected was duly paid over. The surety then is not to be made liable by the acts of the Commissioners for a longer period or to a different extent than he contemplated, or than the statute itself contemplated. The collector and Commissioners cannot, by agreeing to do a wrongful act, make the surety himself liable. This wrongful appropriation cannot alter the rights of third parties. The doctrine laid down by the Judges of the Court of Common Pleas when this case was under their consideration cannot be supported. It was there said (*e*), with respect to the issue raised on the second plea, "This involves the main question between the parties, namely, whether the payment by *Bigg* to the Receiver-general of all the sums received by him for assessments for the year 1828-9, but the not paying in all these sums for the service of that year, but, on the contrary, the paying in of the sum of 693*l.*, part thereof, expressly to the service of former years, during which he had been collector, was a satisfaction of the condition of the bond? and we think such a payment is not a 'duly paying over to the Receiver-general' within the meaning of the condition. The two Acts so often referred to evidently contemplate that the money granted by assessments in a given year shall be paid for the service of that year, and no other." But the answer to these observations is, that *Bigg* had no right to make, nor had the Commissioners any right to assent to, this appropriation of the money of one year to the satisfaction of what was due for a former year. The parish was liable to be re-assessed for the money due at the moment when the Plaintiff in Error became surety. In the judgment in the Court of Common Pleas (*f*) this

(*e*) 9 Bing. 562, 563.

(*f*) 9 Bing. 563.

hardship upon the parish was referred to, and it was argued as if the parish was to be protected by the bond from this liability to a re-assessment for the money not duly paid. But that liability existed before the Plaintiff in Error became surety ; it existed in respect of the past year, and he became surety for the year succeeding that in which the default had been committed. He was not bound to take on himself the liability of the parish, whose authorities should have taken care to see that the money collected was duly paid over. The Plaintiff in Error did not enter into the bond to indemnify the parish for the past year, but to guarantee the due collection and payment of the rates for the year then to come. That condition of the bond has been duly fulfilled. Again, if the Commissioners had been negligent in enforcing payment in one year, they can have no justifiable pretence to make good their neglect, by coming on the surety of a succeeding year for payment. They have their remedy against the surety of such preceding year, and to that remedy they must be confined. The Plaintiff in Error cannot have an action against the former surety, but the Commissioners can, and against him they ought to proceed. The effect of this judgment as it stands is to favour one surety at the expense of another, and that, too, when the person thus made liable had no notice of the previous default, which it was the duty of some other person to inquire into and prevent. By putting in force any of the powers given by the various sections of the statute, the Commissioners had the means of knowing whether anything, and what, was in arrear. They were bound to have that knowledge, and to give notice to the new surety in case his so becoming surety was to render him liable to the previous

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default of the collector. The payment made in this particular year of all the money collected within the year is payment within the meaning of the Act, and is therefore an answer to the alleged breach of the bond. The rule, that a party paying money has a right to appropriate the payment as he pleases may be true, as between an ordinary debtor and creditor, but not as regards the surety of a public officer, bound by the settled rules of his office to pay over in every particular year what he has collected in that year. Such officer has no right to make a special appropriation of this kind, nor have the Commissioners the right to receive and adopt this appropriation. The jury here found expressly that all the sums of money collected in the year had been duly paid; this was negating the breach alleged, and the verdict was, therefore, properly given for the surety. That verdict ought to be maintained. The second question in the case is, whether, supposing the surety to be liable in respect of this wrongful appropriation, he can be held liable until after the Commissioners have shown that they have seized and sold the goods of the principal debtor. The second question depends on the construction to be put on the 13th section of the statute. The language of that section is positive; it does not leave anything to the discretion of the Commissioners. They ought to have proceeded against the principal debtor, and they have only the right of coming on the surety for the balance which remains due after they have sold the property of the principal. Here they took no proceedings against the principal, but went at once against the surety. Six out of seven of the Judges in the Exchequer Chamber thought that the principal debtor ought first to have been proceeded against, but they de-

cided against the Plaintiff in Error, on the ground that there was no proof of notice to the Commissioners that the principal debtor had property within their jurisdiction. That introduces the last question for consideration. It is submitted that the allegation of notice in such a case is immaterial. Who ought to give notice, and when and how should notice be given? The statute contains no enactments, nor even directions, on this subject, and this House will not import this matter of notice into the statute merely to throw a liability on an innocent party. The surety had no notice till the writ was served on him. Can the Commissioners enforce the bond against the surety if the principal had property which they might have made available? They cannot, and they cannot justify their mode of proceeding by saying that they had no notice that the principal had such property, for in no part of the statute is notice to them declared to be necessary. And there was no evidence at the trial that the Commissioners had ever made the endeavour to find whether the principal debtor had any land within their jurisdiction. So that they cannot set up their right on the ground that they did all they could to discover the property of the principal. It is clear that, in fact, they could allege no such thing on their part, for they must have known the situation and circumstances of the collector, and could not need notice as to his property. The seventh section of the statute requires the Commissioners to be inhabitants of the district for which they act; the assessors are also inhabitants, and by these persons are the collectors appointed. This almost seems a provision intended to render notice unnecessary. It is most probable that in this case they had full knowledge of the property of the collector, and there is no finding of the jury that they had not such knowledge. If they

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had such knowledge, that was sufficient, for the ordinary rule, applicable to cases of bills of exchange, that although a party has knowledge he must yet have notice, will not apply here, the difference between the two cases being plain and palpable. There is but one authority on the construction of this statute, and that is the case of *Peppin v. Cooper* (g). It was a case well considered by most eminent Judges, and it distinctly lays down the rules that ought to govern the decision of the present case. It is clear from that case that this office is an annual office, that the liability of the surety therefore is only an annual liability, that no notice to the Commissioners is necessary, and that the bond against the surety cannot be put in suit until after there have been proceedings taken by the Commissioners against the goods of the principal. Mr. Justice *Littledale*, when this case was taken before the Court of Exchequer Chamber (h), said that the goods of the principal must be sold, for that “the meaning of the clause is, that the deficiency must be ascertained first; for otherwise it is putting the bond in suit for the whole, when the Act says it shall only be so for a deficiency.” That was not done, and in that respect, therefore, the proceedings of the Defendants in Error are incorrect. The judgment of the Court below is incorrect. The Court had no authority to enter a verdict *non obstante veredicto* on the last issues, which had been found, and properly found, in favour of the surety.

Mr. Serjeant *Taddy*, for the Defendants in Error:—
 The judgment of the Court below ought to be affirmed; but if that cannot be so on the whole record, the judgment ought to be for the Commissioners on some of the

(g) 2 Barn. & Ald. 431.

(h) 2 Bing. N. C. 42.

issues, and for them *non obstante veredicto* as to the rest. That there was a breach of the condition of this bond cannot be doubted; it is clear therefore that so far the judgment of this House ought to be for the Defendants in Error; then comes the question whether they ought to seize the goods of the collector before they are entitled to come on the surety: even if they are bound to do so, that obligation does not arise until they have had notice of the fact that there is property of that person within their jurisdiction. They had no such notice here. There is indeed an allegation of notice in the plea; but every one familiar with pleading knows that that general allegation means nothing, and is often inserted without the least reference to the facts. There is no allegation in the plea showing specific lands within the jurisdiction of the Commissioners to have been possessed by the collector, and to have been known to the Commissioners as his property; such an allegation ought to have been inserted in the plea, had the notice to the Commissioners been intended to be relied on. It is clear that without such notice the Commissioners were not bound to seize lands. The plea itself, by alleging notice, showed that the defendant in the Court below treated notice as necessary; and this notice must be actual and not constructive notice. The Commissioners were not bound to go about instituting inquiries to discover the lands of which the collector might be possessed. If they were bound to seize his lands in the first instance, which is by no means admitted, they were not bound to do so except upon notice given them that he had lands, and that certain lands pointed out to them were his. This notice was a condition precedent to their duty to seize. This point is raised by the rejoinder to the replication on the fifth plea.—[Lord *Brougham*: But

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that rejoinder is irregular, it dose not take issue on the defendant's allegation.]—Still the want of notice is a matter raised for consideration on the face of the record. The plea alleged that the Commissioners had notice, and that notice must give the Commissioners a real practical knowledge of the fact (i). There is no pretence that such a notice was given in the present case. The giving of this notice was a condition precedent. What were the leading objects of the bond, and what the rights of the parties? The bond was taken in pursuance of the Act of Parliament, the leading object of which was to secure the raising of the money for the public service. The next object was to secure the parish from the danger of re-assessments. Now in this bond nothing whatever is said of seizure. The 52d clause, which gives the power of sale, only gives it as consequent to the power of seizure, which in itself is merely discretionary. The Commissioners are at liberty to exercise a sound and prudent discretion as to seizure, but having seized they are bound to sell. That last part of the clause is for the benefit of the surety, but it does not override the other parts of it. If the Commissioners had seized the lands of the collector, and had then brought an action on the bond against the sureties, that part of the clause would have enabled the sureties to apply to the Court, on the ground that the Commissioners were wilfully delaying to sell the lands they had seized ; but it does not compel the Commissioners to make the seizure. On the other hand, if the Commissioners had sold the lands and applied the money, the surety might have moved the Court to stay the proceedings till the money received by them had been duly carried to account for his credit. These are the

(i) Co. Litt. 309 b.

objects of the statute, and in deciding whether a particular provision of a statute is a condition precedent or not, the Court will look at the general objects of the statute. Looking at them it is impossible to say that this is a condition precedent. The party who becomes a surety, does so, among other reasons, for the protection of the parish; he is not to be protected at the expense of the parish; *Peppin v. Cooper* (*k*) is not an authority in point, for the facts there were wholly different from what they are in the present case. If the House should think that the Commissioners were not entitled to notice, then the verdict on the issues relating to notice will be for the Plaintiff in Error; but as there has been a clear breach of the bond, the judgment must be entered for the Defendants in Error, notwithstanding the verdict.

Mr. *Wightman*, on the same side:—If the Court below pronounces a judgment, which though right in substance is wrong in point of form, a Court of Error may correct what is wrong and give the right judgment. The Commissioners here were justified in receiving the money tendered to them on account of what was due for the former year; they had no right to refuse it when so tendered, and to say, We know that the money now tendered was collected for the account of this year, and we will not receive it on account of what is due for a former year. If they had no such right of refusal, then their having so received it forms no ground of answer to this action. It is true that the office is an annual office, because it is of importance that the money received within the year should be appropriated to the wants of the year; but if not so appropriated in one year, the Commis-

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sioners have no right to say that the balance shall not be made up on the first opportunity. Then the question arises, whether it is a condition precedent to putting the bond in suit against the surety, that the property of the principal should be seized and sold. Some of the Judges doubted whether it was a condition precedent, and the words of the statute do not clearly make it out to be so. If that is the case, then the Commissioners cannot be defeated in this action because they have not seized and sold the goods of the principal in the first instance. The 13th section of the statute gives the Commissioners the power to seize and sell the property of the principal, and without that section they could not make such seizure. But it does not therefore follow that, because they have the power, they must seize and sell the property of the collector. All that that section does is to give the surety the benefit of any sale of the property of the principal which may have taken place. It is clear from the whole of the judgment of Mr. Justice *Littledale*, that he was of opinion that there ought to have been notice to the Commissioners, for that it never could be the object of the Legislature to fetter them in the right to recover, by the mere fact that they might possibly have knowledge of the principal having property within their jurisdiction. Now here the Commissioners allege that all his property of which they had notice they have sold. The issue does not virtually include the notice. Notice is a substantive allegation, and must be proved as alleged. If so, then the omission of any allegation of notice in the rejoinder is an admission that the Commissioners had no notice. The issue presented on the fifth plea, and the replication and rejoinder, may be an immaterial issue, if found for the surety, but it was a material issue

when found for the Commissioners, for it showed that they had no notice of any lands of the collector which they might have seized.

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Sir *W. Follett*, in reply:—The pleading here is insufficient on both sides, and the verdict as now entered for the plaintiffs below cannot be supported. There was payment here of the year's collection, according to the terms of the bond and the statute, and the error was that of the Commissioners themselves, in permitting the sum thus paid in to be taken to the account of a former year. The appropriation of one year's receipts to the purposes of a previous year is positively illegal, and the money thus paid in must now be treated as paid to the account of the year for which the Plaintiff in Error was surety. The finding of the jury settled the fact that the collector had goods which might have been seized and sold. If that is true, it is clear that the Commissioners were not entitled to call for formal notice of the existence of such lands and goods, but ought to have shown that they had made due inquiries for property of the collector within their jurisdiction, and had not been able to find any. That is according to the true construction of the statute, which requires the Commissioners to seize and sell all that they could and might discover.—[The *Lord Chancellor*: But suppose we think that the inferences stated in the plea are not sufficiently stated in point of law, may we not give the plaintiffs judgment *non obstante veredicto*, according to the case of *Goodburne v. Bowman* (1)?]—That case is contrary to every principle before decided: besides, that case is not in point with the present, for

(1) 2 Moore & Scott, 700; 9 Bing. 532.

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there the pleas were held bad ; but here, some of them at least are good ; and with any good pleas on the record, the House will not give judgment for the plaintiff *non obstante veredicto* ; nor will the House, under such circumstances, award a repleader. There is not here any confession of the cause of action.

The *Lord Chancellor* :—There are, my Lords, some questions in this case on the merits and some on the pleadings, and I should wish to frame such questions to the Judges as will procure answers satisfactory in every possible way.

His Lordship then stated generally the nature of these questions, and proposed to take time to frame them.

Lord *Brougham* agreed with this proposal.

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The following were the questions afterwards proposed for the opinion of the Judges :—

1. A bond is given by the defendant, as surety for *A. B.*, a collector of assessed taxes, for the parish of *D.*, in the county of *E.*, for the year 1828, to the Commissioners of the assessed taxes, with a condition to the following effect :—“ That if the above-bounden *A. B.* do and shall well and faithfully demand and collect all and every the sum and sums of money in the said assessments charged and specified, of the respective persons from whom the same shall or may be payable, and shall and do, in case of non-payment thereof, duly enforce the powers of the said Acts against such persons who may make default therein, and also well and truly pay or cause to be paid unto the Receiver-general of the said taxes, rates and duties for the said county of *E.*, all such sum and sums of money

as shall come to the hands of the said *A. B.* as such collector, upon the days and at the times by the said Acts appointed for the payment thereof, and according to the true intent and meaning of the said Acts; and also do and shall, when thereunto required, at such times and places as shall be appointed for that purpose, give and render, or cause to be given and rendered unto the Commissioners appointed or to be appointed to put the said Acts in execution, or to any two of them, a just and true account in writing of all such sum and sums of money which he the said *A. B.* shall have collected and received by virtue or on account of the said assessments, and shall forthwith pay and deliver the same unto the said Commissioners, or any two of them, or unto such person or persons whom they or any two or more of them shall appoint, then this obligation to be void, or else to remain in full force and effect."

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A. B. paid to the Receiver-general of the taxes for the said county all the sums of money collected and received by him, and which came to his hands as collector for the year 1828, at the proper days and times mentioned in the condition, and appointed by the Acts of Parliament (43 *Geo.* 3, c. 99, and 3 *Geo.* 4, c. 88) for payment thereof; but he did not pay all those sums to the account or service of that year, but a part only, and the residue he paid to the account or service of former years for which he had been collector; but the defendant not having been surety for the said *A. B.* for the former years; and by such payment the account of former years was paid up and satisfied. Was this conduct of *A. B.* a breach of the condition of the bond?

2. *A. B.* had after the time of such breach (supposing that a breach took place) certain lands and

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goods in the district, and within the jurisdiction of the said Commissioners, of which the Commissioners had knowledge, before an action was brought on the bond: an action being brought—Is it a defence to that action that the Commissioners did not before suit seize and sell the said lands and goods?

3. Is it a defence to such action that the Commissioners did not seize and sell, supposing that the Commissioners had no knowledge before the commencement of the suit of the existence of such lands or goods?

4. To an action on such a bond by the Commissioners, a plea was pleaded (the fifth plea), to which there was a replication and rejoinder as set out in the special verdict: the jury found that there were lands and goods of *A. B.* within the jurisdiction after the default and before the commencement of the suit, but that the Commissioners had not notice thereof: ought the issue raised by the rejoinder to be found for the plaintiff or the defendant?

5. Supposing the verdict to be entered for the defendant on the said issue, and supposing it is not a defence to the action that the lands and goods of *A. B.* were not sold by the Commissioners unless they had notice (meaning knowledge) of their existence; can the verdict be entered for the plaintiff *non obstante veredicto*, on the implied confession in the rejoinder, that, if there were lands and goods, &c., the Commissioners (the plaintiffs) had no notice of their existence?

6. Supposing the judgment could not be so entered, and the issue raised by the said rejoinder be immaterial—Can a Court of Error award a repleader, and ought it to do so in this case?

7. Supposing a Court of Error cannot or should not award a repleader, what judgment ought it to

pronounce? Ought it to be a judgment for the plaintiffs on the whole record, on the ground that the other pleas, or the issues found thereon, contain a sufficient confession or afford sufficient proof whereon to found a judgment for the plaintiffs, disregarding the immaterial issue?

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The Judges who were present at the argument (*m*) differed in opinion, and on the 4th *July* 1839, delivered their opinions *seriatim*, in answer to the questions which had been proposed to them.

Mr. Justice *Coltman* :—The first question proposed (*Coltman, J.*) by your Lordships in this case does not appear to me to be doubtful. The condition of the bond is (amongst other things) that *Richard Bigg* shall well and truly pay to the Receiver-general all such sums of money as shall come to the hands of the said *R. Bigg* as such collector, upon the days and at the times by the said Acts appointed for the payment thereof, and according to the true intent and meaning of the said Acts. Now, the monies in question, not having been paid to the service or account of that year in respect of which they had been assessed, but in payment of what must for this purpose be considered as the private debt of the collector, cannot, I think, be considered as having been paid according to the true intent and meaning of the Acts. The condition of the bond, therefore, has been broken, and the bond forfeited.

To the second question proposed by your Lordships, it ought I think to be answered that the defence suggested would be a valid defence to an action brought against the surety. The question turns upon

(*m*) *Littledale, J., Vaughan, J., Parke, B., Bosanquet, J., Patteson, J., Gurney, B., Williams, J., Coleridge, J., and Coltman, J.*

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the proviso in the 13th section of the 43 *Geo.* 3, c. 99, construed with reference to the 52d section of the same Act. It seems to me, that, unless it is held that the Commissioners are bound to exert legal diligence against the principal before suing the surety, the surety will be deprived of the benefit which the Act intended to give him. The statute (s. 52) gives power to the Commissioners to seize and sell the whole real and personal estate of the collector making default. It is obvious that the exercise of this power may be, and is likely to be, highly advantageous to the surety; and I conceive that the intention of the Act was, to give the surety the benefit in the first instance of this process, instead of compelling him to pay the whole amount of the arrears, and leaving him to seek for his indemnification by an action at law, or other more circuitous course, against his principal, at the risk of being defeated by accident or chicanery. This construction appears to me to be also most agreeable to the natural and obvious meaning of the words made use of in the proviso, and to be the sense in which any ordinary person about to enter into a contract of suretyship would understand them. By putting a refined and artificial sense on the expressions, and by construing them otherwise than as the party contracting would be likely to understand them, we should be making the Act of Parliament a snare to those who might bind themselves as sureties upon the faith of its provisions.

To the third question proposed, it should I think be answered, that it is no defence to the supposed action, that the Commissioners did not seize and sell lands of the existence of which they had no knowledge, before the commencement of the suit.

By the statute 43 *Geo.* 3, c. 99, s. 13, it is provided

that no bond shall be put in suit against any surety for any deficiency other than what shall remain unsatisfied after sale of the lands, &c. of such collector, in pursuance and by virtue of the directions and powers given to the Commissioners by that Act. The question thereupon for consideration, is, what the lands are which are to be sold under the directions and powers given by the 52d section of the Act. By that section, the Commissioners in their respective jurisdictions are authorised and empowered to seize and secure the estate, real and personal, of the collector, to him belonging, or which shall descend to his heirs, executors or administrators, wheresoever the same can be discovered and found. Now, although the word "wheresoever" is an adverb of place, and its proper sense should seem here to be, in what place or in what hands soever; yet, taking the whole sentence together, it obviously implies that the collector may have property which cannot be discovered by the Commissioners. And when the section goes on to direct the Commissioners to sell and dispose of all such estates as shall be for the cause aforesaid seized and secured, it seems to me that, by necessary implication, the words "such estates" must be construed to mean such estates as the Commissioners shall have discovered; for they cannot have seized and secured any others. This construction seems to me to be called for by considerations of public convenience, and to be in no wise unjust towards the surety, who may reasonably be expected, and from a regard to his own interest will naturally take care, to inform the Commissioners of any property belonging to his principal which can be discovered.

I cannot but look upon the surety as being in a considerable degree identified with the party for whose

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acts he has undertaken to be responsible, and at least as having much better means of knowledge as to his circumstances than the Commissioners; and if the surety is not able to discover the concealed property of his principal, it seems to me unreasonable to expect that the Commissioners shall do it.

To the fourth question, the answer I think ought to be, that the issue raised by the rejoinder must be deemed to have been found for the defendant.

To clear the way for the consideration of this question, it is necessary to state with particularity the substance of the pleadings. The fifth plea alleges three matters of substance—first, that the collector was possessed of divers lands and goods which were subject and liable to be seized and sold, and might have been seized and sold—secondly, that the plaintiffs had notice of this—thirdly, that the lands and goods had not been sold. The replication alleges that the collector had not any lands of which the plaintiffs had notice, and that some of his goods had been seized and sold, and that there were no other goods belonging to him, within the jurisdiction, of which the plaintiffs had notice. The rejoinder is, that the collector had divers lands which the Commissioners could and might have seized and sold, and that all the goods of the collector which could and might and ought to have been discovered were not seized and sold, in manner and form as the plaintiffs had alleged, and thereof the defendant put himself upon the country.

Now, in the allegations of this rejoinder, as it seems to me, no assertion of notice to the plaintiffs is involved. That it is not asserted in express terms, is clear; and I see no reason to think that the defendant intended to involve it. On the contrary, he appears

to have omitted it designedly, and to have inserted what seems intended as a substitution for the allegation of notice, when he avers that the goods could and might and ought to have been discovered. I cannot, therefore, see any ground for extending the sense of the issue tendered beyond what the words naturally import. Taking this to be the effect of the rejoinder, it cannot but occur to ask whether any issue at all is joined; for the rejoinder contains nothing contradictory to the allegations in the replication; on the contrary, the two are entirely consistent. To make an issue, regularly, there should be an affirmative on one side and a negative on the other, meeting each other directly; and various cases are to be found in our law books in which, for a neglect of this rule, it has been held that no issue had been joined, and that the defect was not aided after verdict, but that the verdict was a nullity: see *Sandback v. Turvey*(o), *Oxford v. Rivett*(p), *Derby v. Hemming*(q), *Kirle v. Lees*(r). There are other cases, however, in which the same strictness has not been observed, and in which, after one party has made an allegation and offered to go to the country upon it, and thereupon the similiter has been added, and a trial had, it has been considered as an agreement by both parties to go to trial upon that allegation, and an informal mode of joining issue upon it, which, as far as that informality is concerned, is aided, after verdict, by the statute 32 *Hen.* 8, c. 50: see the cases of *Walthall v. Aldrich*(s), *Parker v. Taylor*(t), *Burton v. Chapman*(u). It is difficult to reconcile these two classes

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| (o) Cro. Jac. 585. | (r) 3 Leon. 66. |
| (p) Cro. Car. 79. 93; Het. 33. 60. | (s) Cro. Jac. 588. |
| (q) Cro. Car. 593. | (t) Cro. Car. 316. |
| | (u) Sid. 241; 2 Keble, 278. 280. |

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of cases with each other ; but it appears to me reasonable to adhere to the latter class, and to hold that where the parties have, by going to the country on a particular point, agreed to treat it as an issue joined, it should be considered, after verdict, as being such, though informally joined. The result is that the parties in this case are to be deemed to have joined issue upon the allegations contained in the rejoinder, that rejoinder not importing any allegation of notice. I consider, therefore, the issue as being in substance only this,—whether *R. Bigg* had any lands and goods which were not seized and sold. The rejoinder in terms says, in addition, that the lands might have been seized and sold, and that the goods could and might and ought to have been discovered. But it does not appear to me that, under these terms, any separate issuable matter of fact is asserted, or that by the insertion of them the nature of the issue is changed ; for when it is said that the lands could and might have been seized and sold, it is but the statement of a conclusion resulting necessarily from the existence of the lands ; and when it is said that the goods could and might have been discovered, the assertion, standing nakedly as it does, is but the assertion of a possibility which necessarily results from the fact of their existence. When it is alleged that the goods ought to have been discovered, that is not an allegation of a fact to be proved, but of a legal obligation supposed to result from the facts alleged. Considering, therefore, the only fact in issue to be, whether *R. Bigg* had lands and goods not sold before the action brought, and it being found by the verdict that he had, I think that the issue raised on the fifth plea is found for the defendant.

But although the informal mode in which the issue

is joined is I think cured, after verdict, by the statute, there is another defect in the issue which is not aided by the statute, namely, its immateriality; for, notwithstanding some early cases to the contrary, it is now well settled that a verdict, though it may cure an informal, cannot cure an immaterial issue. The verdict, therefore, though found for the defendant, cannot give him any title to a judgment in his favour. The case is the same, if the true view of the pleadings is that no issue at all is joined; for, in that case, the verdict is to be considered as a nullity as far as the fifth plea is concerned, and consequently the defendant cannot be entitled to judgment upon it; *Sandback v. Turvey* (x).

To your Lordships' fifth question, it ought I think to be answered that judgment cannot be entered for the plaintiffs *non obstante veredicto*, on the implied confession in the rejoinder that the plaintiffs had no notice of the existence of the lands and goods in question. The ground on which such a judgment may be given is explained by Lord *Holt*, in *Staples v. Heydon* (y), where he is reported in substance to have said: "Where the defendant confesses a trespass, and avoids it by such a matter as can never be made good by any sort of plea, there, in such a case, judgment shall be given upon the confession, without regard to the finding upon an immaterial issue. But where the matter of the justification is such a matter as if it were well pleaded would be a good justification, there, though it be ill pleaded, yet that shall not be taken to be a confession of the plaintiff's action. And the books do all of them, if they be narrowly looked into,

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(x) Cro. Jac. 585.

(y) 2 Lord Raym. 924; 6 Mod. 10; 2 Salk. 579; 3 Salk. 121.

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turn upon this difference—where the confession is full, and the matter of the plea is ill in substance.” And the form of entering up the judgment is quite consistent with the principles here laid down by Lord *Holt*: see *Viner’s Abridgment*, Judgment (D), pl. 1; *Broadbent v. Wilks* (z). The present case does not fall within the rule so laid down; for the defendant’s plea, if true in point of fact, is a valid defence to the action: and no instance can be found in which judgment has been given *non obstante veredicto*, except where the plea pleaded by the defendant has been insufficient in point of law.

But it is said that the Court must consider it as established upon this record that one of the material allegations of the plea, viz. that of notice to the plaintiffs, is not true; for the replication asserts that the collector had not any lands of which the plaintiffs had notice, nor any goods, but those sold, of which they had notice; and the rejoinder, by not re-asserting the notice, must be considered as having admitted its non-existence; and consequently the record must be taken as if the plea had not contained any allegation of notice, in which case it would have been insufficient in law. Now, although it should be conceded, that, upon the trial of the issue raised, the want of notice must be considered as admitted, it would not follow that when the issue is found to be immaterial, and the question arises whether there ought to be a repleader or a judgment *non obstante veredicto*, the non-existence of notice is to be considered as an established fact. The case seems rather to range itself in the class of those in which the defendant may have failed through mispleading, rather

(z) Willes, 366.

than through an inherent defect in the substance of his defence. He may have mistaken the law, and selected the wrong fact to put in issue; but, if a repleader were awarded, he might, for anything the Court can see, succeed in establishing the plea originally put forward as the ground of his defence.

But it may be urged, that, in the case supposed in your Lordships' question, the finding of the jury has established the non-existence of notice. To this the answer is, that the finding in question is of a matter not within the compass of the issue: and the Court, I conceive, cannot pay any regard to a finding by the jury which has no tendency to decide the issues raised by the pleadings; for the jury are sworn only to decide the issues joined, and the parties cannot be supposed to have come prepared to try anything else. The jury, in the case supposed, have found as a fact that there was no notice to the Commissioners; but the question whether there was such notice or not, not having been put in issue, cannot be considered as ever having been tried and judicially determined.

These reasons, combined with the absence of all precedent for pronouncing a judgment *non obstante veredicto* in a case where a valid and sufficient plea was pleaded in the first instance, have led me to the conclusion that such a judgment cannot be given in the present case.

To your Lordships' sixth question, the answer is that a Court of Error cannot award a repleader. In the case of *Holbech v. Bennett* (a), it was said by Lord Hale, that, in the King's Bench, on error from the Common Pleas, it was anciently the custom to

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(a) 2 Saund. 319; 2 Keb. 769. 689. 825; 2 Lev. 11.

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award a repleader; for which he cited many records; but he said it was obsolete and not in use in his time, and had not been done for one hundred years. Subsequently to this case, it has been commonly received in the law, and it is to be found in many text-writers, that a repleader cannot be awarded by a Court of Error: and I think rightly so; for it is to be observed, that, to deny a repleader where it ought to be awarded, is error; *Staple v. Heydon* (b); and it seems to follow, that if a Court of Error can award a repleader, it would be bound to do so in all cases in which the inferior Court ought to have done so. If, then, it were held that Courts of Error have the power to award a repleader, it would follow that they have done wrong in the course they have been pursuing for so many years; a supposition which cannot be admitted under a system of laws professing, as the *English* code does, to rest mainly upon precedent.

To your Lordships' seventh question, it should be answered, that, if judgment cannot be entered for the plaintiff *non obstante veredicto*, and if the Court cannot or do not award a repleader, the judgment given in the Court below ought to be reversed, and that judgment cannot be pronounced for the plaintiffs on the whole record, on the ground suggested.

Your Lordships' question renders it necessary to consider the doctrine on which the case of *Goodburne v. Bowman* (c) rests; and it will appear on consideration that the present case does not fall within the principle on which that case, as I understand it, proceeded. The declaration in *Goodburne v. Bowman* was for a libel. The defendant pleaded the general

(b) 6 Mod. 2.

(c) 9 Bing. 532; 2 M. & Scott, 700.

issue, and several special pleas justifying the libel as true. The verdict was for the plaintiff on the general issue and on one of the pleas of justification, and for the defendant on the other pleas. The plaintiffs applied for judgment *non obstante veredicto*. The Court were of opinion that the special pleas contained a confession of the action, and that the answer set up was insufficient by way of avoidance. But it was observable in that case that some of the allegations of the declaration were admitted by implication only, and not in express terms; and a doubt might be suggested whether there was a sufficient confession of all the material allegations of the declaration. The Court, therefore, went on to say (as I understand their meaning), that, even if they were not fully confessed by the special pleas, yet, inasmuch as they were put in issue by the plea of the general issue, and had been proved upon the trial, and a verdict had thereupon, they were as effectually established on record as if directly and in terms confessed; and the justification being bad in substance, they held that the plaintiff was entitled to judgment on the whole record. But the present case is different. No question is made here whether there is a sufficient admission of the material allegations contained in the plaintiffs' declaration: but the ground on which the plaintiffs are not entitled to judgment, is, that the Court cannot see that the avoidance is insufficient, inasmuch as upon an examination of the fifth plea, and the issue raised upon it, the Court cannot see sufficient ground for assuming the falsity of the allegation of notice contained in the plea. Now, if it had appeared judicially from any other part of the record that the plaintiffs had had no such notice, the case of *Goodburne v. Bowman* would have furnished

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a precedent in the plaintiffs' favour. But I see nothing in any other part of the record which can clear up the ambiguity on this point; the finding of the jury respecting notice not being entitled to be considered as a judicial determination on that point, for the reasons adverted to in a former answer.

In this state of the case, it seems to me that the judgment which ought to be pronounced, should be simply a judgment of reversal, which will leave it open to the parties litigant to bring a new action, if so advised.

(Coleridge, J.) Mr. Justice *Coleridge*:—In answer to the first question propounded by your Lordships, I beg to state, that, in my opinion, the conduct of *A. B.*, in the case supposed, was a breach of the condition of the bond. Upon this question it will not be necessary to state the reasons for my opinion at any great length. The bond and the condition are framed to secure the due discharge of the duties of the collector in his office: his office is but for a year's duration, and his duty (amongst other things) is, to pay to the Receiver-general, at the times specified, the monies which he shall collect upon the assessments for the year, in discharge of those assessments: to pay them in discharge of the arrears of former assessments is no more such a payment than to pay them on any private account to the Receiver-general, or to any other person, would be. Whether this were done with or without the participation or collusion of that officer, seems to be immaterial. The condition is broken, if, with the knowledge and by the act of the collector, in whole or in part, the monies collected are not paid in discharge of that assessment under which they were collected.

In the case supposed in your Lordships' second

question, I am of opinion that it is a defence to the action that the Commissioners did not before suit seize and sell the lands and goods there mentioned, if such action be brought against the surety. This seems to me to flow as a necessary and direct consequence from the language of the first proviso in the 13th section of the 43 *Geo. 3*, c. 99: and I can give no effect to that proviso, which was evidently framed to make a distinction between the principal and surety, in favour of the latter, unless by so construing it. The bond is taken under the provisions of that section; and it seems to me that the proviso is virtually incorporated in the condition of the bond, and that it limits the liability of the surety to the making good the deficiency remaining after sale of the collector's lands and goods. Many reasons in support of this view of the case occur to the mind, and have already been suggested in the printed judgments formerly delivered in the case now before your Lordships: but it seems to me more satisfactory to rely on the unambiguous language of the proviso itself. According to that, the surety is made liable to be sued, not for every deficiency, but for a particular and limited deficiency, *i. e.* that which shall remain after sale of the lands, tenements, goods and chattels of the collector. That liability only he must be taken to have contemplated when he sealed the bond. To hold that he may be sued before sale, for the general deficiency, is to subject him to a different and enlarged liability, and, in effect, to expunge the proviso from the statute.

I am equally of opinion that the want of seizure and sale by the Commissioners will be an answer to the action, although they had no knowledge before the

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commencement of the suit of the existence of the lands and goods. This opinion I express with much diffidence, because I have reason to fear that it differs from that entertained by some of my brethren. But I arrive at it upon the same principle that led me to my answer to your Lordships' second question—the principle, namely, of collecting the meaning and intention of the statute from the unambiguous expression used, rather than from any notions which I may entertain of what is just or expedient.

Having considered with attention and respect the reasons that have been stated in support of a contrary opinion, I am bound to say that they have not satisfied my mind. The question arises simply on the construction of the proviso in section 13, before referred to: in terms it is silent as to notice to the Commissioners, or knowledge had by them: the words are—"no such bond shall be put in suit against any surety for any deficiency other than what shall remain unsatisfied after sale of the land, &c. of such collector, in pursuance and by virtue of the directions and powers given to the Commissioners by this Act:" and the question is, whether these words are to be understood as if, instead of them, the statute had said—"all lands, &c. of such collector of the existence whereof, or otherwise, the said Commissioners shall have been apprised by the said surety before the commencement of such suit." This is the question: and the test by which I think it ought to be tried is this—whether this addition is a necessary implication from the words already used, in order to give them a sensible meaning and effect. If by this test I can see that the proposed addition is already necessarily contained, although not expressed, in the statute, it is of course not the less

cogent because not expressed. But I cannot concede that we are at liberty, upon any ground whatever, to add a new term to the statute. In saying this, I am not unmindful of the *dicta* to be found in our books, nor of decisions upon old statutes, which seem to warrant a more free dealing with the written law; and whenever Acts of Parliament shall again be framed with the generality and conciseness with which the Legislature spoke some centuries since, it may be fit to consider the soundness of that principle of interpretation which they involve: but it is enough to say that it is wholly inapplicable to a modern statute, in which the Legislature is careful to express all it intends in so many words, that to go beyond their necessary implication is to make, not to interpret law. The principle, then, on which I rely will not let in the consideration of particular circumstances in each case, or a regard to a greater or less degree of convenience, a more or less complete effect to be given to the presumed intent of the Legislature. Nothing, in short, which is founded on what the Legislature might better have done, nor simply even what the Legislature intended; the sole legitimate inquiry is, I conceive, what intention is to be found in the words of the Act, expressed or implied: unless, by words written or words necessarily implied and therefore virtually written, the intention has been declared, we cannot give effect to it.

Now, that the words are sensible by themselves, as read without any implied addition, nay, that, the proviso being framed confessedly for the benefit of the surety, the absence of the proposed addition will more largely effectuate its general intent, can, I think, scarcely be denied. The argument, indeed, takes another direction—that it is necessary to qualify or

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restrain the proviso by implying the necessity of knowledge in the Commissioners, in order to prevent the words from having their full natural operation, because that would defeat the very object of the section itself. This seems to me avowedly to be an alteration of the statute; and therefore I should not feel removed from my position, if I were to concede that the effect of my interpretation would be that which is alleged. I am not, however, driven to such a concession: if the Commissioners do their duty, they will, before the appointment of collectors in any of the three modes pointed out by the 9th, 13th, and 14th sections of the statute, and before the admission of any persons to be sureties, take care to inform themselves of the properties of the collectors, in such a manner as to prevent any practical difficulty arising from the proviso. I observed, in passing, that though there are three modes of appointment mentioned in the statute, and in one of them the Commissioners themselves are the parties to select the collector, yet the same form of condition and the same proviso applies to all—a circumstance not without its weight in respect of the argument founded on the difference as to the knowledge of the circumstances of the collector, which it is said may be presumed to exist between the Commissioners and the sureties.

I do not notice in detail the different suggestions which have been made in favour of the qualified interpretation of the proviso, and which are founded on considerations of inconvenience or liability to fraud in the literal one; because my argument, if a sound one, denies the admissibility of any such considerations. But one argument that has been used demands an answer. It is said, that the proviso being for the benefit of the surety, justice requires that he should

inform the Commissioners of those circumstances which bring him within its reach. I own this appears to me to beg the question, or to misrepresent the situation of the parties :—if my contract has only been to be answerable for what shall remain after seizure and sale of my principal's property ; if you cannot sue me for anything till you have exhausted that primary fund—what principle of justice requires that I should undertake the responsibility of discovering that fund ? why am I to help you to the performance of this condition, which is to give you a right of action against myself ? If, indeed, it can be shown that I collude with my principal, or take any step to conceal or make away with his property, any presumption may properly be made against me. Something analogous to this, though not expressly in point, is, the course of decisions with regard to the landlord's re-entry under the 4 *Geo.* 2, c. 28, where no sufficient distress is found on the premises : the burthen of search in every part of the premises, and of proof that no distress was there, is cast on the landlord ; but if the tenant is shown to impede such search in any way, the presumption immediately shifts, and is cast upon the tenant.

I cannot but feel, in conclusion, that the argument on the other side is but a disguised attempt to alter a law which is thought to be imperfectly expressed. To do this is always unjust in the particular case, because it works an *ex post facto* alteration of the contract between the parties ; and unsound in legal principle. My sense of the practical importance of this doctrine must be my excuse for having troubled your Lordships so long with my answer to the third question.

In answer to your Lordships' fourth question, I beg to state that, in my opinion, on the facts supposed,

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the issue raised by the rejoinder ought to be found for the defendant. The allegation and denial of notice in the plea and replication appear to me immaterial: the rejoinder, therefore, rightly passed them over, and tendered the issue on that which was material—on which there has been a sensible finding by the jury.

As a judgment *non obstante veredicto* is always upon the merits, and assumes, not only that the defence, even if good in form and true in fact, is bad in law, but that it discloses a confession of the plaintiff's case, the hinge upon which the answer to your Lordships' fifth question will turn must be, whether the rejoinder, being by the supposition (but not in my opinion) bad in point of law, though true in fact, also confesses the remaining allegations of the replication which it has not denied. In terms, a pleading of this description, which merely selects for denial one of many facts alleged in the previous pleading, admits nothing as to the residue. For the purpose, indeed, of trial before the jury, every thing is admitted but that which is denied: where, however, the fact so denied and found is immaterial, a distinction has always been taken between a pleading of this sort and one which confesses and avoids. In the case of *Plummer v. Lee* (e) the Court of Exchequer acted upon this distinction. The same distinction in principle appears to have been recognised as early as in the case of *Pitts v. Polehampton* (f), in which Lord Holt took this difference—that, "where the defendant's plea confesses the duty demanded by the plaintiff, and does not avoid it sufficiently, if the issue be immaterial, and found for the plaintiff, he shall have

(e) 2 M. & Welsby, 495; 5 Dowl.
755.

(f) 1 Lord Raym. 390.

judgment; but if the defendant's plea goes in discharge of the action, and the issue is taken immaterially, and verdict for the plaintiff, a repleader shall be granted." I therefore beg to answer this question in the negative.

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In the case of *Bennet v. Holbech* (g), Lord *Hale* said that it had even then become obsolete for the Court of King's Bench to award a repleader on a writ of error: and it has ever since, I believe, been the understood practice that a repleader cannot be awarded by a Court of Error. Your Lordships are not in possession of the record; and I do not see how you can carry into effect that which judgment of repleader is intended to produce. This judgment directs that the parties replead, and the cause begins again from the point at which the defect in the pleading appears: it is calculated, therefore, to bring them to a material issue in fact or law: and the House would be called upon to perform the functions of an original Court for the trial of the cause, without having the record in its possession, or the means of summoning a jury, giving day to the parties, or using any of that machinery by which, in the Courts below, causes are regularly carried on to judgment.

Your Lordships' seventh question is new. In answering it, I must assume that the opinion which I have ventured to express in answer to your third question is erroneous, and also that, if there had only been the fifth plea pleaded, the Court below should have directed the parties to replead. In that state of things, as I have already stated that I think your Lordships cannot award that judgment, I see no other course that would have been open for this House but

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simply to have reversed the judgment for the plaintiffs pronounced below. The question then arises, whether the fact of there being other pleas and other issues on the record so found that upon them a satisfactory judgment could have been pronounced for the plaintiffs below if the fifth plea had not been pleaded, will enable this House now to pronounce that judgment, although the fifth plea be there, and the issue arising on it not disposed of satisfactorily. Upon principle I should have no difficulty in answering this question in the negative. The fifth plea is pleaded to the whole cause of action. In what way a material issue raised upon it may be disposed of, the House cannot at all anticipate judicially: it may be for the defendant below; and if so, all the other issues become wholly immaterial. To pronounce judgment, then, as to the whole record, in this state of it, is to exclude one party from a defence on which he relies; to prejudge one defence by conclusions drawn from the demerits of other defences. This injustice is prevented by the rule, which I have always considered universal and inflexible, that each plea is to be looked at by itself for all purposes, except where by reference it incorporates any of the allegations of another. If, indeed, the House saw that the issue on any one good plea was in favour of the defendant, the merits of the other pleas might be disregarded. But that is only because they then become immaterial as to the final issue of the cause.

I have stated that, upon principle, this did not appear to me a difficult question. But I am aware of the case of *Goodburne v. Bowman* (*h*), where, in a considered judgment of the Court of Common Pleas, expressions are to be found at variance with the opinion I have expressed. I feel the full weight of that

(*h*) 9 Bing. 532; 2 M. & Scott, 700.

high authority; but I am bound to express to your Lordships the opinion which I still entertain; and it is some satisfaction to me to observe that the principle on which I rely is expressly asserted in the same judgment, and that the departure from it, which I cannot acquiesce in, is not necessary to the decision then made by the Court.

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Upon the whole, therefore, my answer to this question is, that on the supposition made, the judgment below ought to be simply reversed.

Mr. Justice *Williams*:—As it so happens (singularly enough, it seems) that, upon the first question proposed, there is no difference of opinion, I shall trouble your Lordships very shortly in answer to it. I think that the payment of part of the money received by the collector for the year 1828 to the account or service of former years, was a clear breach of the condition of the bond. It seems to me that such application of the money differs in no respect from the payment by the collector of any other debt contracted at any other time and in any other manner.

The answer to the second question must depend upon the true construction of the proviso in the 13th section of the 43 *Geo.* 3, c. 99. That section, after declaring that collectors, if required, shall find good and sufficient security by bond, in the manner prescribed, has the following proviso: “That no such bond shall be put in suit against any surety or sureties for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods and chattels of such collector, in pursuance and by virtue of the directions and powers given to the respective Commissioners by this Act.” In considering the true intent and meaning of this proviso, I pass by the

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opposite inconveniences which have been pressed in argument, by observing that they may probably be considered as balancing each other. Our business, however, is with the construction of the statute; and, if that be ascertained, consequences are to be neglected. And the proper construction is, to give effect to the intention of the Legislature as far as possible; and if there be provisions seemingly inconsistent, to reconcile them so as to further that intention. This, I apprehend, is true generally, and will probably not be doubted. If, however, any authorities be requisite, they may be found in *Comyns's Digest*, Parliament (R.10). Now, that the proviso was introduced expressly for the benefit of the surety, seems to me to admit of no doubt; I can attribute to it no meaning or effect at all, except that be the object. The language seems to me to be perfectly plain and appropriate. The object also is quite consistent with the position of the surety, and his relation to the principal; because there is nothing in the bond in question, or in that relation, to raise an inference that the former should be liable except upon failure of the latter. This proviso also is introduced in a manner equally consistent with this view of the subject. In the earlier part of the section, the liability of the surety is described; and then comes the proviso imposing a restriction upon that liability. Except, therefore, the application of the lands and goods (if any) be deemed a condition precedent to calling upon the surety to make good "the deficiency," no effect is given to the proviso, and it might as well be expunged altogether. Either the proviso does impose this condition, or, in my opinion, it does nothing. I am desirous of bringing before your Lordships in as concise a form as possible what occurs to me upon this part of the subject: it has been

pursued more fully and in detail (if that should be thought worthy of reference) on a former occasion (i).

I have before observed that the words of the proviso seem to me plain and unambiguous: they are, "no such bond shall be put in suit against any surety or sureties for any deficiency other than what shall remain unsatisfied after sale of the lands, goods," &c. of the collector: that is, no bond shall be put in suit for the arrears of the collector, but only for the deficiency, if any, after his property has been applied, as in reason and justice it ought, to discharge those arrears, as far as it will go. The distinction seems to me to be obvious and plainly marked between the collector and the surety. By the 52d section, which contains the "directions and powers" alluded to in the proviso, the Commissioners are authorized and empowered (not required) to make sale of the lands and goods of the collector. Against him, therefore, the bond may be put in suit before sale; for he is not within the benefit of the proviso; whereas that was framed expressly for the protection of the surety, and he (the latter) in my opinion cannot be sued before sale made, if practicable.

When I before observed to your Lordships that the language of the proviso seemed to me to be free from doubt, I was not unmindful of the criticism which has been made upon the words "no such bond shall be put in suit," as if they were distinguishable and might have a different meaning from "no action shall be brought," or "no proceedings shall be had or taken." I am, however, unable to perceive any distinction, and cannot but think that, both in common parlance

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(i) See 2 Bing. N. C. 9; 2 Scott, 26.

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and in legal acceptation, the terms are identical and have precisely the same meaning. That they would be so understood in a popular sense, I think is beyond a doubt; and that they ought to be so understood legally, I also think. I observe that Lord *Tenterden*, in *Peppin v. Cooper* (*k*), where the question was upon this same Act of Parliament, uses two of the phrases in exactly the same sense. His Lordship, whose general precision and accuracy of expression are well known, observes: "I am clearly of opinion that the bond might be put in suit without selling the goods of *Pepper*, who, in this case, was a mere surety; for, although it appears on the face of the bond that he is a collector also, still he is not the collector contemplated by the Act, whose goods must be sold before proceedings are had upon the bond against the surety. And what is the distinction between 'proceedings had upon the bond' and 'action brought upon the bond?'" *Holroyd, J.*, says: "I also think that this bond may be put in suit against the surety, although it may happen that another person has been jointly appointed a collector, without first selling the lands and goods of that person; for the collector contemplated by the Act, whose goods are to be sold previously to the bond being put in suit, is the collector who has made default." Having mentioned this case with a view to the understanding of the expressions upon which I was commenting, I beg leave to observe that I would by no means press or strain any inference deducible therefrom. I am quite aware that it is no authority bearing upon the present case, nor anything like it. The decision merely is, that whereas two collectors had been appointed, and one only had

(*k*) 2 B. & Ald. 431.

made default, it was not necessary to sell the non-defaulting collector's lands and goods before having recourse to the surety. But it is, at the same time, undeniable that both the learned Judges do expressly allude (to say no more) to the sale of the defaulting collector's lands and goods as a condition precedent to resorting to the surety. This view of the subject seems to be in conformity to what was very early laid down upon it.

The third question I must beg leave to answer with some qualification; the reason for which I hope to make apparent, when, in answer to the next question, I shall have to consider the effect of the rejoinder to the replication to the fifth plea, the finding of the jury thereon, and the general result therefrom. If I am to suppose that the Commissioners "had no knowledge," after due and reasonable diligence exerted by them to ascertain the fact, of the existence of lands and goods of the collector which they might have seized and sold, it seems to me that, under such circumstances, a good defence could not be made by the surety. If, however, the Commissioners "had no knowledge," from the same cause that always occasions ignorance—simply, not trying to learn—I think there may be a good defence, from the fact of the possession of lands and goods by the collector, after his default and before action brought, even though the Commissioners, upon the supposition last made, were ignorant of the existence of either. This is said upon an assumption at present (to be considered more fully presently) that neither from the statute, nor from any general rule of law, is the surety bound to give any notice, or furnish any knowledge (your Lordships, it seems, understanding the expressions to be equivalent) whatever to the Commissioners of the existence of lands

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or goods of the collector. I will endeavour to explain my meaning by reference to the pleadings themselves:—Suppose the fifth plea to have stood as it does, omitting the allegation of notice: if the replication, by appropriate allegations, had shown reasonable diligence in the Commissioners to discover lands and goods of the collector, and that none could be found, it seems to me that such replication would have been an answer to the plea. If, on the other hand, the replication had merely stated that the Commissioners had no notice or no knowledge of any lands or goods, it would, in my opinion, contain no answer at all, and would be bad on general demurrer.

The fourth question raises the points upon which so great a difference and variety of opinion unfortunately exist amongst the Judges: and in our answer to this question, I adopt the supposition contained in it, viz. that issue has been joined upon the rejoinder, and that upon that issue there is a finding of the jury in the words stated in the question, and that finding is in its terms for the defendant below: whether it be so in substance, remains to be considered; and, for this purpose, it may be necessary to advert to the course and state of the pleadings from the said fifth plea downwards.

That plea alleges, that, before the exhibiting of the bill, the collector had lands and goods within the jurisdiction of the Commissioners which might have been seized, &c. of which the plaintiffs had notice. The replication thereto is, that the collector had no lands of which the plaintiffs had notice, and that all the goods of which the plaintiffs had notice were seized and sold, and that, after such seizure, there were no goods, &c. of which the plaintiffs had notice, liable to be seized, &c. The rejoinder (dropping all men-

tion of notice) states, that, after failure by the collector, he had lands which ought to have been seized and sold, and that all the goods, &c. of the collector, at his failure, which could and might have been discovered and found, were not seized and sold; and concludes to the country: and the plaintiffs add the similiter. And, how far the facts contained in that rejoinder, and the corresponding finding of the jury, amount to a defence, without the fact of the plaintiffs below having notice of such lands and goods, is the question: and that, perhaps, may be tried as conveniently as in any other manner by examining whether the fifth plea would have been a good defence to the action, if the allegation of notice had been omitted altogether. The statute is entirely silent upon the subject. The proviso, in especial aid and protection of the surety, contains no allusion to notice from him being requisite; nor is there, in my opinion, anything in the relation of the surety to his principal requiring any such notice from him. The language of the 52d section, "wheresoever the same can be discovered and found," to which reference has been made upon this part of the case, seems to me to have relation merely to the powers of the Commissioners in the pursuit of the property of the collector, and to enlarge those powers. I cannot think that it bears upon the question of notice from the surety, or that it is possible to construe the meaning of the expression to be, that such property as the Commissioners had not notice of from the surety must be deemed property "that could not be discovered and found." And moreover, when, it may be asked, is notice to be given by the surety? It is not pretended that any is due to him; and, accordingly, the first information he will receive of the

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failure of his principal, and his own liability, will probably be the service of the writ.

But, further, it seems to be material to ascertain what the rule of law generally is with respect to the necessity of averring notice. And, upon this point, I take it to be clear, that, where a fact lies equally within the knowledge of both parties, the party pleading need not aver notice to the other; and still less is it necessary, where the means of knowledge are more especially within the reach of that other. Upon a point I presume hardly questionable, I should be sorry to weary your Lordships with unnecessary citation, and will therefore refer generally to the case of *Cutler v. Southern* (l). As this point, however, seems to me to have an important bearing upon the whole subject, I will refer more particularly to one case only of some notoriety, in which this question arose. I allude to the case of *Rex v. Hollond* (m), which was an information against the defendant, with others, for malversations in office whilst one of the council at *Madras*, for not having foreseen and provided against the outbreak of *Tippoo* Sultaun. The seventh count of that information charged, especially, that the defendant had not sent notice of the rupture between the Sultaun and the *East India* Company to the Governor at one place, and to a General at another. To the information there was a general demurrer; and the objection to the seventh count was, that there was no averment of notice to the defendant of the rupture which he was charged with not notifying to others. The Court, observing that the case was one of great

(l) 1 Saund. 117, (2); and see 2 Saund. 62 a, n. (4).
 (m) 5 T. R. 607.

importance, took time to consider of their judgment, which Lord *Kenyon* afterwards delivered. Upon this point he is reported to have said, "The objection (that is, to the seventh count) that notice to the defendant is not sufficiently averred, seemed to be pretty much abandoned by the defendant's counsel, in consequence of what fell from the Bench in the argument. The rules stated by Mr. *Wood* in his argument seemed to show the true grounds upon which notice is or is not required to be averred." And, upon reference, it will be found that the rule which received the matured approbation and adoption of the Court is thus laid down:—"Notice here merely means knowledge, as your Lordships understand it in this case; and where the matter is as much in the knowledge of the defendant, or more than in any other person, the law presumes that he had knowledge. 'None is bound by the law to give notice to another of that which that other person may otherwise inform himself of (*n*);' and in pl. 12, 'Notice is not necessary where the thing lies as much in the cognizance of the one as the other.' "Now here," continued the late very learned Baron, "all the facts of which the defendant should have had notice, are of such a nature that it was his duty as a member of the council at *Madras* to know them."

It remains, therefore, to consider how the matter stands as between the surety and the Commissioners in this particular; and, in so doing, I shall reject all attempts at an inference arising from general probabilities (such as the care and foresight of the surety in entering into the engagement, or the contrary—what inquiries he might or might not make into the

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(*n*) 16 Vin. Abr. Notice (A. 2), pl. 10.

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substance of his principal), as utterly precarious and insecure.

It seems to me that our duty is to examine what and with whom the means of knowledge are, according to the provisions of the Act of Parliament itself. Now, so far as the surety is concerned, the statute, as might be expected, is silent as to the recommendation of caution or means of information; he is left to himself. With the Commissioners, however, the case is otherwise: by the 9th section, they are to appoint assessors, who are to act upon oath, and moreover are to be charged and instructed by the Commissioners in the requisites for discharging their duty. Further, by the same section, the assessors are to return two or more able and sufficient persons of the places for which the assessors act, to be collectors. It seems to be clear, therefore, that, in the due performance of their duty, the assessors are bound to inquire into the sufficiency of the persons returned, including, of course, their substance and property; and if the matter had rested here, it might perhaps have been not unreasonably considered as a statutory mode pointed out to the Commissioners of ascertaining by deputed authority the means of the persons to be appointed. But the section goes further, and enacts that the persons so returned by the assessors are to be appointed by the Commissioners; and as persons are presumed to do their duty (and particularly when acting upon oath, for the Commissioners also are sworn), it must be taken as against them (the Commissioners) that they became acquainted with the property of the persons about to be appointed, and of this collector, *Bigg*, amongst the rest; and this supposition and construction is the more probable and reasonable, because the collector is not required by

the 13th section to find security at all events, but only if required by the Commissioners. This, therefore, seems to imply that the Commissioners ought to inquire in each case, or else how can they exercise a discretion as to requiring or dispensing with security in the case of each appointment? And why, then, is notice to be required from the surety to those who by the very supposition of having done their duty have acquired knowledge already?

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I have mentioned at the outset that my answer to this question proceeds upon the supposition that there is an issue joined, and that too, in the terms of the rejoinder to the replication to the fifth plea. I must, however, take leave to state to your Lordships that I entertain great doubt (to say no more) whether there be any issue joined at all; because there certainly is not an affirmation and denial of the same fact or facts in that replication and rejoinder, except, indeed, all that is alleged in the replication about notice can be considered as wholly without meaning, which it seems very difficult to say.

Upon the whole, it seems to me that this case is brought abundantly within both or either of the rules or conditions dispensing with the necessity of averring notice. When, therefore, I find that the rejoinder contains the same allegations which would have been sufficient to make the fifth plea good and a defence to the action, and that on the twelfth issue (in the terms stated in the question) raised upon the rejoinder, the finding is for the defendant below, my opinion is that the issue ought to be found for him. It is true that the jury do also find (in the manner stated) "that the Commissioners had not notice." But it is to be observed, first, that this fact is not included in the issue, and next, that admitting the finding of such a

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fact to be within the competence of the jury, it is not, without more (for the reasons, such as they are, already given at a length, I fear, inconvenient to your Lordships), available for the plaintiffs below. This circumstance, therefore, does not affect the conclusion at which I have arrived, and which is as above stated.

To avoid repetition, I have endeavoured to bring together, in answer to the third and last questions, almost all that occurs to me upon the whole subject. And from those answers, it is obvious that my opinion is against a part of the suppositions contained in this (the fifth) question. Adopting, however, as I am bound to do, those suppositions, my answer is still in the negative: because, first, I do not think there is any such admission as that alluded to; and next, if there be, that the consequence would follow that judgment *non obstante veredicto* can be entered for the plaintiffs below. It surely cannot be carried to the extent of admitting no notice or knowledge, after due means used to obtain it. Differing as I have the misfortune to do, from my brother *Littledale* upon the point of notice, I agree entirely with his observations upon this part of the case in the Court below. He is thus reported (o): "The plaintiffs may contend that they are entitled to judgment *non obstante veredicto*, but there seems a great difficulty in saying that; for the rejoinder is not one which shows that the defendant has no defence on the whole case, which is the ground of entering a judgment for the plaintiff in such case. The finding of the jury that *Bigg* had lands, is not like an allegation which furnishes no defence; but it is part of an allegation which, coupled with something else, would constitute a defence; and that

(o) 2 Bing. N. C., 49; 2 Scott, 62.

something else is imperfect and does form part of the issue which the jury ought to try, and if found one way would show there was a defence, but in the other way not."

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If, as is certainly done continually, a *venire de novo* may be awarded by a Court of Error, it seems difficult to assign any very good reason why it may not award a repleader. My learned brothers, however, have almost all expressed an opinion that it cannot be done. Lord *Hale*, in *Bennet v. Holbech* (*p*), is reported to have said, after referring to many cases in which a repleader had been awarded, "that it is obsolete, and not in use at this day." The books of practice assume that it cannot be done; and I cannot find any instance of the revival of the usage since the time of Lord *Hale*. I am not prepared to say, therefore, that a repleader can be awarded.

The latter part of the seventh question has been, in substance, answered by what I have already said upon the fifth, viz. that the other pleas, or the issues found thereon, do not in my opinion contain a sufficient confession or afford sufficient proof whereon to found a judgment for the plaintiff upon the whole record. The earlier part involves in it the result of the whole inquiry, which is, in my opinion, that the judgment of the Court below ought to be reversed: but, inasmuch as there does not appear to be any appropriate issue whereon to sustain the finding of the jury in favour of the defendant, which otherwise would have entitled him to it, I do not think that judgment can be pronounced for him.

Mr. Baron *Gurney*:—It appears by the special (*Gurney*, B.) verdict, to which the first question refers, that *A. B.*

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was duly appointed collector of the assessed taxes for the year 1828 ; and that the Plaintiff in Error duly entered into a bond with a condition for payment by *A. B.* to the Receiver-general of the taxes of all the sums collected and received by him and which came to his hands as collector for the year 1828 ; but that he did not pay all those sums to the account or service of that year, but a part only, and the residue he paid to the account or service of former years for which he had been collector,—for which former years the party in this cause was not surety. The plain and necessary result from this statement is, that *A. B.* violated his duty, and that the bond is forfeited. The appointment is for the year 1828. The duty under that appointment is confined to that year. The bond is for the due performance of his duty for that year. It was his duty to apply the collection of that year to the account or service of that year. The application of any part of the money collected under the assessments of that year, to cover any deficiency in any former year, is just as much a breach of his duty, and a forfeiture of this bond, as if he had paid the money to any other creditor, or lost it at the gaming table. The suretyship was for the conduct of the collector in the year 1828, and no other. Neither the collector nor the surety was contemplated in any other character than as collector and surety for that year. The collector for the former year might have been different ; the sureties for the former year were different ; but these circumstances cannot make any difference in the consideration of this question.

The second and third questions are, whether this action can be maintained against the surety until the Commissioners shall have sold the lands, goods and chattels of the collector, within their jurisdiction ; and

your Lordships have propounded questions to the Judges founded upon the different suppositions of the Commissioners having and not having notice of that fact.

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I am of opinion, that, if the collector had lands, goods and chattels within the jurisdiction of the Commissioners, they could not put the bond in suit: and I do not think that their right of action is affected by their knowledge or their ignorance. The statute 43 *Geo.* 3, c. 99, s. 13, directs the security to be given by the collector, with the two sureties, by a joint and several bond; and directs that every such bond given by way of such security, shall be prosecuted by the Commissioners on any failure or default of the collector: "Provided always, that no such bond shall be put in suit against any surety for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods and chattels of such collector, in pursuance and by virtue of the directions and powers given to the respective Commissioners by this Act." If, therefore, the collector has lands, tenements, goods or chattels, I think that the sale of them by the Commissioners is a condition precedent. This proviso holds out to the persons who become sureties for collectors, that they shall not be resorted to until all the means of payment from the property of the collector shall have been exhausted. And if that be not fulfilled to the very letter, I think that the surety does not receive the security or advantage which is held out to him by this proviso.

I admit that this question of knowledge is not free from difficulty. It may be said that a fact of which the Commissioners are ignorant, is the same as a fact that does not exist. The special verdict upon which these questions are founded, however, shows that the

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ignorance of the Commissioners in this instance arose from a want of due diligence, as the jury found that the collector had lands and goods, and that the Commissioners had reasonable grounds for believing that he had. Another observation serves to show that knowledge or ignorance does not enter into this question. If knowledge be necessary, it must be, I apprehend, the knowledge of the two or three Commissioners who are the obligees in the bond. The Commissioners consist of a large number of persons: it may happen that these two or three persons may be utterly ignorant; whereas a hundred and fifty others may have entire and perfect knowledge. The Act of Parliament does not require that the knowledge shall be brought home to the obligees of the bond, nor even to the Commissioners, or any of them; and I do not think that that can be superadded. It is the safer and the sounder construction of the Act, to consider this as an absolute condition precedent.

In discussing this point, it has been remarked that the 52d section, to which the proviso refers, does not make the proceeding by the Commissioners against the collector compulsory; that it merely empowers the Commissioners to proceed. I have given the fullest consideration to this argument; but it does not appear to me to be satisfactory. The 52d section empowers the Commissioners to seize, and requires them to sell the collector's property. The 13th section, I think, peremptorily requires that the Commissioners shall exercise that power before they resort to the surety. It may be said that this construction of the statute may materially embarrass the Commissioners in prosecuting the sureties of the collectors who are defaulters. Undoubtedly it may; but I do not think that violence is to be done to the

express words of an Act of Parliament, for the purpose of relieving the Commissioners from embarrassment. Another Act of Parliament may be passed which may be free from ambiguity. These cases of embarrassment, I fear, always arise from neglect of duty. If Commissioners did their duty, collectors would not have the opportunity of committing such enormous embezzlements, and their sureties would escape the ruin with which they are sometimes overwhelmed. In the case of *Peppin v. Cooper* (*q*) it was not necessary to decide this precise point, as the question there made was, whether or not the goods of another collector must be first sold. But that argument necessarily brought this proviso under the consideration of the Court; and Lord *Tenterden*, speaking of the collector, speaks of him as one “whose lands and goods must be sold before proceedings are had upon the bond against the surety.”

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The answer to the second and third questions includes the answer to this question; that the issue ought to be found for the defendant.

The view which I have taken of the case renders it almost unnecessary for me to answer the remaining questions.

The answer to the fifth question is included in the answer to the fourth; and is, that judgment cannot be entered for the plaintiffs *non obstante veredicto*, on the implied confession in the rejoinder to the replication to the fifth plea, that the plaintiffs had no notice of the existence of the lands and goods in question.

I am of opinion that a repleader cannot be awarded by a Court of Error. That is laid down by Lord

(*q*) 2 B. & Ald. 431.

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Hale, in *Saunders (a)*. One hundred and seventy years have elapsed since, and no instance of the award of a repleader under circumstances like the present, has occurred from that time to this.

I think that the judgment for the plaintiffs ought to be reversed.

(*Patteson*, J.)

Mr. Justice *Patteson* :—In answer to the first question proposed by your Lordships, I am of opinion that the conduct of *A. B.*, as therein described, was a breach of the condition of the bond therein mentioned. The words of the condition of that bond are, that he shall “well and truly pay, or cause to be paid unto the Receiver-general of the said taxes, rates and duties, for the county of *Middlesex*, all such sum and sums of money as shall come to his hands as such collector, upon the days and at the times by the said Acts appointed for the payment thereof, and according to the true intent and meaning of the said Acts.” The intent and meaning of the said Acts, amongst other things, was, that the monies collected in each year should be carried to the account of such year. Now, though *A. B.* paid to the Receiver-general all the monies collected by him in the year in question, yet he did not pay the whole to the account of that year: he did not, therefore, pay the monies according to the true intent and meaning of the Acts. He paid them in discharge of a debt which he owed in respect of the collection of former years, in violation of the intent and meaning of the Acts; whether with the consent of the Receiver-general or not, seems to be immaterial; and his conduct in so doing seems to me to be as much a breach of the condition of the bond as if he had applied the monies to the payment of any other debt which he owed.

To the second question proposed by your Lordships, I answer that, in my opinion, it is a defence to an action brought by the Commissioners on the bond, that they did not, before suit, seize and sell the lands and goods of *A. B.* of which they had knowledge. This is an action against a surety who has entered into a bond under the provisions of an Act of Parliament: 43 *Geo.* 3, c. 99. Before entering into that bond, he would naturally look at the Act, with a view to discover the nature of his engagement, the liabilities he was to incur, and the means of protection afforded him: he would construe the Act in the plain and obvious sense which its language imports: and surely he would have great reason to complain if a Court of Law, upon any question of his liability arising, should put a forced and technical construction on that language, to his prejudice. He finds that the Act, in the 13th section, directs the Commissioners, in case of default in the collector, to prosecute, *i. e.* put in suit, the bond; provided always, “that no such bond shall be put in suit against any surety or sureties for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods and chattels of such collector, in pursuance and by virtue of the directions and powers given to the respective Commissioners by this Act.” Those directions and powers are contained in the 52d section of the Act, which authorises and empowers (not requires) the Commissioners, in case of default, to make sale in a summary manner of the collector’s lands and goods, wheresoever the same can be discovered and found. The Commissioners are not obliged to seize and sell the collector’s property: they may put the bond in suit against him without doing so; for he is not within the proviso in the 13th section; yet they may

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first seize and sell the collector's property, if they please, and may afterwards put the bond in suit against him; and if they do so, it is plain that, as the bond comes within the 8 & 9 *Will.* 3, c. 11, s. 8, they cannot recover more than what remains due after deducting the produce of the sale. Now, the proviso in the 13th section was obviously intended to put the surety in a better situation than the collector: but if that proviso be not held to constitute a condition precedent, their situation will be precisely the same. And, indeed, it seems to me to be impossible to give any effect at all to that proviso, except by construing it as any unlearned man would do, viz. as a condition precedent. It has been suggested that the Commissioners might exercise their powers under the 52d section, for the benefit of the surety, after enforcing the bond against him, and so give effect to the proviso. But, on examining again the words of the 52d section, it is clear to my mind that the Commissioners could not be justified under it in making sale of the collector's property to satisfy a debt which had been already discharged by the surety, and, as far as the Commissioners are concerned, altogether satisfied. That section empowers the Commissioners to seize the collector's property, if he shall neglect to pay any sums received by him: but they are not at once to sell; they are to give 10 days' public notice of a meeting; and, in case the monies be not paid and satisfied, they are required to sell, to satisfy, and pay into the hands of the Receiver-general, the sums due, with costs and charges, and render the overplus to the owner of the property. It seems to me, that if the surety has paid the monies due before any seizure of the collector's property, it cannot be said that the collector has neglected to pay, so as to authorise the Commissioners to seize, within the meaning of that

section ; nor, again, if they could seize and hold a meeting with 10 days' public notice, could it be said that the monies due were not paid and satisfied, so as to require or empower them to sell ; nor, if they did sell, could they pay the monies into the hands of the Receiver-general, he having already obtained the amount from the surety. The powers given by that section are, as I apprehend, primarily intended for the benefit of the Commissioners in the exercise of their public duty : and if they have no longer any public duty to perform, which they have not as soon as the monies due are paid, they have no right to exercise those powers. The benefit to the surety from the exercise of those powers seems to be a secondary object, and arises only from the proviso contained in the 13th section. Without that proviso, the surety could have no right at any time to call for the exercise of those powers for his benefit ; and, as the terms of that proviso plainly relate only to a sale antecedent to his being sued, I am at a loss to see by what construction of the Act he could call for the exercise of those powers after he had paid the money.

The third question proposed by your Lordships is one upon which I have entertained much doubt ; but I have come to the conclusion that it is a defence to the action, that the Commissioners did not seize and sell lands or goods of the collector, if any such existed, although they had no knowledge of their existence. No words can be found in the Act of Parliament which require any such knowledge ; and there are provisions as to the appointment of collectors, by which the Commissioners have the means of knowing whether they are able and sufficient persons. Those provisions, indeed, apply only to the time when the collectors are appointed, and do not give the commis-

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sioners any greater facilities for discovering the property of the collectors than any other person may have. It may be said that, if the mere existence of any such property, though unknown, and perhaps concealed, and therefore not seized and sold, were to defeat the remedy against the surety, it is obvious that much opportunity for collusion and fraud would be afforded, and all attempts to enforce the payment of monies by the surety might be from time to time defeated, without any real neglect on the part of the Commissioners; and that it is very reasonable to require that the party for whose benefit a seizure and sale are to take place, should give such information to the Commissioners as will enable them to make such seizure, or at all events should not set up the want of such seizure as a defence, unless he can establish that the Commissioners have been guilty of a culpable neglect in not making it. Every Act of Parliament, as well as any other document, must have a reasonable construction; and I apprehend that such construction ought to prevail as will effectuate the obvious intention of the Legislature, provided no violence be done to the language which it has adopted. It may also be said that the very object and intention of the Legislature in requiring that the collector should find sureties, will be frustrated if it be held that the existence of any unknown or concealed property of the collector will defeat the remedy against the surety; at the same time that the benefit intended for the surety may be amply preserved by requiring the seizure and sale of the known property of the collector as a condition precedent to his being sued for the monies due. These reasons led me upon a former occasion (s) to entertain the opinion that knowledge of the existence

(s) 2 Bing. N. C. 21; 2 Scott, 36.

of such lands and goods was necessarily implied in the proviso which limits the power of suing the surety. I am, however, free to confess that, after further consideration of the Act of Parliament, I am not so sure of the intention of the Legislature as to feel that I was warranted in entertaining that opinion : and, as it may be possible that, by putting such a construction upon the Act, I am altering or adding to it, instead of simply interpreting it, I feel myself bound to abide by the literal meaning of the words, and to hold that the existence of any unsold lands or goods which the Commissioners might have seized and sold, is a bar to the action, whether they knew of them or not.

In answer to the fourth question proposed by your Lordships, I am of opinion that the issue raised by the rejoinder (if any issue at all be raised) ought, upon the finding of the jury, to be found for the defendant. In considering the effect of similar pleadings upon a former occasion, I came to the conclusion that the issue, though informal, involved the question of notice. I am free to confess that, upon further consideration, I think that I then came to a wrong conclusion. The replication here asserts that *A. B.* had no lands of which the plaintiffs had notice, that all the goods of *A. B.* of which the plaintiffs had notice were seized and sold, and that *A. B.* had no other goods of which the plaintiffs had notice. The rejoinder asserts that *A. B.* had lands which might have been sold, and that all the goods of *A. B.* which might have been discovered and sold were not seized and sold, and concludes to the country ; and the plaintiffs add the similiter. Here is an assertion on the one side, and denial on the other : put the replication and rejoinder together, and the separate assertions of the plaintiffs and defendant will be found

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jointly to amount to this—that *A. B.* had lands and goods which might have been sold, but of which the plaintiffs had no notice. The plaintiffs have not denied the existence of lands and other goods besides those sold simpliciter, but only the existence of lands and other goods of which they had notice. The defendant has not asserted the existence of lands and other goods simpliciter, but only the existence of lands and other goods which might have been sold. The replication relates to lands and goods of *A. B.* in a particular condition or predicament: the rejoinder relates to lands and goods of *A. B.* in another and different condition or predicament. The more I consider the matter, the more satisfied I feel that no issue at all is raised by the rejoinder: neither an informal issue, which would be cured by verdict; nor an immaterial one, which cannot now be cured at all. But if any issue be raised, I think that it must be an issue in the words used by the defendant in his rejoinder, which concludes to the country, and which do not involve the question of notice: and if it be an issue in those words, it ought to be found for the defendant.

The fifth question proposed by your Lordships is one which, according to my view of it, is of very general importance as a question of pleading. It involves the consideration whether any pleading which concludes to the country (except, perhaps, the anomalous statutable plea of bankruptcy) contains any confession of the matters stated in the previous pleading, and not denied. Here I take the issue (if any there be), as I have already stated, to be in the words of the rejoinder, and to be an immaterial issue, for want of involving the question of notice—assuming always, as this question does, that notice is material. Still, as the rejoinder concludes to the coun-

try, and tenders an issue, it must be taken to traverse the whole or some part of the replication. Clearly it does not traverse the whole; it omits that part of the replication which relates to notice, and traverses the seizure and sale of all the lands and goods which might have been seized and sold. Now, the distinction between pleadings by way of traverse, and pleadings by way of confession and avoidance, is familiar to all lawyers; and it is the latter only upon which questions of this sort have hitherto arisen. One of the last cases on this subject is that of *Gale v. Capern* (*t*), in which the defendant pleaded by way of set-off a promissory note alleged to have been made by the plaintiff to a third person, and by him indorsed to the defendant: the plaintiff replied that the said supposed debt on the said promissory note did not arise within six years. It was contended that this replication was no confession of the making and indorsing of the note; that it was not only a denial of its having been made and indorsed within six years, but a denial that it was ever made and indorsed. The Court, however, held otherwise, and considered the replication as a pleading by way of confession and avoidance, and not by way of traverse. The replication there concluded, as it of necessity must, to the Court, because it introduced new matter. The case of *Lambert v. Taylor* (*u*), does not go to the same length; indeed, in the judgment there delivered by Lord *Tenterden*, it is admitted for the purposes of the cause that the plea of the statute of limitations as generally pleaded does not admit a cause of action. Unquestionably, for the purposes of trial, a traverse of one out of several allegations in the pre-

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(*t*) 1 Ad. & E. 102; 3 N. & M. 863.

(*u*) 4 B. & C. 138; 6 D. & R. 188.

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ceding pleadings admits the facts stated in the other allegations, and renders it unnecessary to adduce any evidence in support of them : and so far it is an implied confession of them : yet it seems to be only a confession *sub modo*, and not an absolute confession, as all pleadings are which go on to attempt an avoidance. I have always understood that judgment *non obstante veredicto* is only to be allowed in a very clear case, where the defence set up is good in form and true in fact, but insufficient in law, and so the pleadings show that the defendant has no defence upon the merits in any way of putting his case. Now, that is by no means the result where the plaintiff has averred some fact among others showing together a sufficient cause of action, but which fact, being separately traversed, turns out to be immaterial. In such a case how can it be said that, if the traverse had been properly taken, the jury might not still have found for the defendant? for I am not now considering the effect of any special finding of the jury, but simply of their finding in the words of the issue. Besides which, there is in this case a good plea, containing an averment of notice, and that plea is not disproved in any material part of it; for the issue which arises out of it is by the hypothesis immaterial. Unless, therefore the averment of notice be treated as struck out of that plea, and so the plea be rendered bad, the plaintiffs cannot have judgment *non obstante veredicto*. Now, the dropping of that averment in the rejoinder can at the most amount only to a departure in pleading, which makes the rejoinder bad; it cannot have the effect of striking out that averment from the plea itself. In a very recent case in the Court of Exchequer, the distinction between a judgment *non obstante veredicto* and a

repleader was much considered. I allude to the case of *Plummer v. Lee* (*x*). That was an action of debt on an award, by an administratrix: the declaration stated, that, on the 12th *July* 1833, a settlement of part of the accounts took place between the deceased and the defendant; it then stated a submission to arbitration by the plaintiff as administratrix and the defendant, and an award: the first plea traversed the making of an award; the second traversed that the settlement took place on the day mentioned in the declaration; the third traversed the making of such settlement at any time. On the trial, the plaintiff had a verdict on the first and third issues, the defendant on the second. After argument, and time taken to consider, the Court held that the second plea did not contain any confession, and that judgment *non obstante veredicto* could not be given, but awarded a repleader. This case appears to me to be a direct authority to show that the traverse of an immaterial allegation is not to be taken as an absolute confession of the other allegations, in any pleading.

Upon the whole, therefore, I am of opinion that the verdict cannot be entered for the plaintiffs on an implied confession in the rejoinder.

In answer to the sixth question, I am of opinion that a repleader ought to have been awarded, in the case stated, by the Court below. I think, however, that a Court of Error cannot so award. Lord Chief Justice *Hale* expressly states that in his time the practice of awarding a repleader in the Court of King's Bench, upon error from the Common Pleas, was obsolete and not in use; *Bennet v. Holbech* (*y*); and so it has been laid down in our books of practice ever

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(*x*) 2 M. & Welsby, 495; 5 Dowl. Prac. Cas. 755. (*y*) 2 Saund. 319 a.

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since. Upon a writ of error, the parties are not before the Court upon a day given; and though a practice may have prevailed in ancient times for the Court of King's Bench to award a repleader, into which Court the record itself was always removed from other Courts on a writ of error, and became a record of the King's Bench; yet it does not appear that any such practice ever prevailed in the House of Lords; nor, I believe, is any instance known in which parties have pleaded before the House of Lords, or in which that House has ever issued jury process, or given any judgment except on a writ of error brought: yet such must be the consequence if a repleader be awarded in the case supposed by the sixth question; unless, indeed, the transcript of the record be remitted to the Court in which the original pleadings took place, with a direction that the parties should replead before that Court: a course of proceeding for which no precedent, I believe, can be found.

The seventh question proposed by your Lordships raises a considerable difficulty. In answer to it, I am of opinion that, if there be but one issue on the record, and that be an immaterial issue of such a nature that the Court below ought to have awarded a repleader, but has in fact given judgment for one of the parties, a Court of Error ought simply to reverse such judgment, without giving any judgment in favour of the other party. But where there are several pleas, some or one of which, or the issues found thereon, contain a sufficient confession, or afford sufficient proof, whereon to found a judgment for the plaintiff, whether the immaterial issue on the other plea shall thereby be aided, is a matter of some nicety. No authority can of course be found upon this subject in the older Reports, before the statute of *Anne*, which introduced

several pleas; 4 *Anne*, c. 16. Nor have I been able to find any direct authority since that time, except the case of *Goodburne v. Bowman* (z). In that case, the rule, "that, in considering the merit or demerit of one plea, recourse cannot be had to another, unless expressly referred to," is fully recognised; but it is said that an application to enter judgment *non obstante veredicto* is founded upon the whole record, and therefore that all the pleas may be taken into consideration. With the greatest respect for that Court, I must confess that I have great doubts as to the soundness of the view there taken as to the effect of several pleas. It seems to me to be essential to the due course of pleading, and to avoid confusion, that no blending of pleas should in any instance be permitted, and that whatever may be the number of pleas placed upon the record, each plea should be treated, both in itself and in its consequences, as if it were the only plea on the record. It is to be observed, that in that case the Court intimated an opinion that the pleas respectively did contain a sufficient confession; and therefore what was said as to the finding on the plea of not guilty being received in aid of any supposed defect in the other pleas, was in some measure extrajudicial, though entitled to the highest respect. The present case, however, is distinguishable from *Goodburne v. Bowman*, inasmuch as in that case the pleas themselves out of which the immaterial issues arose were held bad; but here the plea out of which the immaterial issue arose is good, and therefore, even if the finding on that issue be disregarded, still the plaintiffs cannot have judgment; for the good plea not disproved still remains a good bar to the action. The case of *Good-*

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(z) 9 Bing. 532; 2 M. & Scott, 700.

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burne v. Bowman came under consideration in the Court of Exchequer in the case of *Plummer v. Lee* (a), which I have already cited; but a distinction was taken between them, inasmuch as in the latter case no one of the pleas concluded to the Court, and no one contained an absolute confession. In that case, the immaterial traverse was of an allegation in the declaration: and even supposing that the Court might under those circumstances have entirely disregarded the finding on that issue—not so as to have aided that immaterial issue by the allegations in the other pleas, but treating it as if no such traverse had been taken—yet, in the present case, that course cannot be pursued; because, to disregard the immaterial issue would be also to disregard the plea out of which it arises, which is an affirmative plea, and contains a good answer to the action, and has not been disproved in any material part of it.

My answer therefore is, that upon these pleadings judgment cannot be given for the plaintiffs, disregarding the immaterial issue; neither can judgment be given for the defendant; but the judgment of the Court below must simply be reversed.

(*Bosanquet, J.*)

Mr. Justice *Bosanquet*:—I am of opinion that the conduct of *Richard Bigg* amounted to a breach of the condition of the bond. Payment of the money collected in 1828 to the account of former years, was as much a breach of duty as payment to one of the creditors.

I think that neglect of the Commissioners to seize and sell lands and goods of *A. B.*, of which they had knowledge, before action brought, is a defence to such

(a) 2 M. & Welsby, 495.

action. It appears to me that the proviso, which is introduced for the benefit of the surety, makes such seizure and sale a condition precedent to putting the bond in suit, where the Commissioners have knowledge of the existence of such lands and goods.

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But I think that, unless the Commissioners had such knowledge before the commencement of the action, the existence of such lands and goods within their jurisdiction is not a defence; for the proviso must receive a reasonable construction. The 13th section of the 43 *Geo.* 3, c. 99, directs the Commissioners to prosecute if the collector makes default; which direction is followed by a proviso that the bond shall not be put in suit for any deficiency other than what shall remain after sale of the lands and goods of the defaulter. But if the Commissioners had no knowledge of such lands or goods, they are bound by the directions of the statute to prosecute. The Legislature cannot with reason be supposed to have intended that the Commissioners should delay the commencement of a prosecution against the sureties until they should have ascertained by all possible means whether or not the collector is possessed of any lands or goods; and that if, after such suit commenced, any the smallest portion of property should be discovered, a suit honestly commenced pursuant to the direction of the statute should be defeated by a plea of the existence of such minute amount of property within their jurisdiction. Possibly, if the existence of property were communicated to the Commissioners after action brought, proceedings against the surety might be stayed until the property had been sold, and the deficiency ascertained: but, whatever might be the effect of an application for a stay of proceedings, the question now is, whether the proviso creates an unqualified condition

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precedent, or only a condition qualified by knowledge of the Commissioners. And I cannot think that it was intended, by the introduction of this proviso, to render it impossible for the Commissioners with any safety to comply with the directions to prosecute.

It has been suggested, as an objection to this construction, that if, by notice to the Commissioners, is meant notice to all the Commissioners, it would be next to impossible to comply with such condition, considering the great number of persons who fill that character; and that, if notice to less than all be sufficient, a notice to one who may have no knowledge of the bond, would be sufficient to defeat an action duly commenced by the obligees. But in putting what I think a necessary limitation on the words of the statute, to prevent unreasonable consequences, I do not feel myself driven to adopt a condition the compliance with which would be either impracticable or nugatory. The Commissioners are directed to appoint a clerk: and any two Commissioners may act. There can be no doubt that notice to such clerk would be sufficient; so, likewise, would notice to the obligees on the bond, or to either of them, or to either of the Commissioners who direct the bond to be put in suit in the name of the obligees. But I neither think that notice to all the Commissioners is necessary, nor that notice to a person who, though a Commissioner, does not act as such, would be sufficient to constitute a defence. The notice of which the necessity is brought into question upon the pleadings in this case, is a notice to the plaintiffs, the obligees in the bond, previous to the commencement of the action. And I think that whatever would amount to notice to them, would be sufficient: but nothing else.

I think that the issue joined on the fifth plea ought

to be found for the defendant. The issue tendered by him, viz. that there were lands and goods of *A. B.* within the jurisdiction, has been found in his favour. The notice which is negatived by the finding, forms no part of the issue; nor the allegation that the Commissioners could and ought to have sold, which is an inference of law.

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Supposing the verdict to be entered for the defendant on the said issue, and supposing it is not a defence to the action, that the lands and goods of *A. B.* were not sold by the Commissioners, unless they had notice (meaning knowledge) of their existence, still I think that the judgment cannot be entered for the plaintiffs *non obstante veredicto*, on an implied confession in the rejoinder, that, if there were lands and goods, the Commissioners had no notice of their existence. The plea alleges that *A. B.* was possessed of divers lands and goods of which the plaintiffs had notice, and which might have been seized and sold, but which lands and goods then continued unsold. The replication avers that there were no lands which the Commissioners could seize and sell of which they had notice, and that they had seized and sold all the goods and chattels of which they had notice. It admits the existence of some property, and that the Commissioners had notice of it; but insists upon the sale of all the property of which they had notice. Notice of unsold property is therefore alleged on the one side, and the want of notice of any property unsold is asserted on the other. The frame of the replication clearly invited the defendant to take issue in the terms of it, by which the sale of all the property known to the Commissioners would have been denied. But the defendant by his rejoinder avoided such denial, departed from the good defence set up by his plea, and

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chose to rely on the mere existence of property within the jurisdiction, as a new ground of defence; nevertheless, I cannot say that, by omitting to re-assert in his rejoinder the notice which he had alleged in his plea, he has so confessed the want of notice as to authorise a judgment against him, founded on such a confession. In *Staples v. Heydon* (b), Lord Chief Justice *Holt* took this difference—that “where the defendant confesses a trespass, and avoids it by such matter as can never be made good by any sort of plea, there, in such a case, judgment shall be given upon the confession, without regard to such an immaterial issue: but where the matter of the justification is such a matter as if it were well pleaded would be a good justification, there, though it be ill pleaded, yet that shall not be taken to be a confession of the plaintiff’s action:” and he added, “The books do all of them, if they be narrowly looked into, turn upon this difference, where the confession is full, and the matter of the plea is ill in substance.”

But though judgment *non obstante veredicto* cannot be given upon an implied confession in this plea of want of notice, it does by no means follow that a repleader ought in such a case as this to be awarded. If the fault of the rejoinder had consisted in a defective mode of pleading the matter relied on, some ground might be afforded for a repleader, supposing that proceeding could be awarded after a writ of error. But, here, the ground taken for the defence in the rejoinder is defective upon the merits, and cannot by any pleading be made available. The defendant having studiously declined to insist upon the notice mentioned in the plea, and chosen to put

(b) 2 Lord Raym. 924.

his defence upon the mere existence of lands and goods within the jurisdiction, could not make that defence good by any sort of amendment. His omission to include in his traverse the want of notice, was no mistake or mere error in form. A judgment *non obstante veredicto* is always upon the merits; a repleader, upon the form or manner of pleading. *Tidd's Practice*, 9th edit. 922. But whether a repleader ought or ought not to have been awarded in the Court below, it cannot, I apprehend, be awarded by a Court of Error, according to the express authority of Lord *Hale* in *Bennet v. Holbech* (c); and even if it could, I am of opinion that it ought not to be awarded in this case, since it could have no other effect but that of enabling the defendant to set up some new defence.

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The seventh question involves two inquiries: first, whether the pleas and issues contain a sufficient confession whereon to found a judgment for the plaintiffs, disregarding the immaterial issue; secondly, whether they afford sufficient proof to found such judgment.

I have already stated my opinion, in answer to the fifth question, that the rejoinder to the replication to the fifth plea does not contain a sufficient confession of want of notice of unsold property to authorise such a judgment. But, although want of notice be not confessed, still it appears to me that by the same rejoinder the plaintiffs' cause of action is confessed; and consequently, that if it be not sufficiently answered (which, for the reasons already given, I think it is not), the plaintiffs are entitled to judgment. The ground of the plaintiffs' right to recover is, the breach by *Richard Bigg* of the condition of the bond, in

(c) 2 Saund. 319 a.; 2 Lev. 11.

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neglecting to pay to the Receiver-general the sums collected for taxes. The declaration, as usual, states a money bond payable to the plaintiffs on request, in the terms of the instrument. Oyer of the condition having been had, but no breach then assigned, the defendant, in his second plea, pleads performance generally; and then, in his fifth plea, sets up as a defence to any right to recover on the bond, that *Richard Bigg* faithfully collected all sums of money from every person charged, and in every case, long before the commencement of the action, and from thence continually hitherto, was possessed of lands and goods within the jurisdiction of the Commissioners of which the plaintiffs had notice, and which might have been sold, but which were unsold. This appears to me to have been a good plea. The plaintiffs having before, in their replication to the plea of performance, assigned non-payment to the Receiver-general as a breach of the condition, proceed in their replication to the fifth plea to allege, in answer thereto, that, after *Richard Bigg* had collected, and after he had neglected to pay to the Receiver-general, as in their replication to the second plea mentioned, *Richard Bigg* had no lands which they could sell of which they had notice, and that all the goods of which they had notice were sold. The effect of this allegation is, that the condition of the bond had been broken, and that there were no lands or goods of *Richard Bigg* which the Commissioners were bound to sell after the breach of the bond had been committed. The defendant in his rejoinder to this replication, does not merely omit to traverse the neglect to pay to the Receiver-general, but expressly says, that, after the supposed collection and receipt of the money, and after the supposed omission and neglect to pay the Receiver-general

Richard Bigg had lands and goods within the jurisdiction, which might have been sold; thereby admitting, as it appears to me, that the condition of the bond had been broken by such non-payment to the Receiver-general, and relying on matter insufficient to excuse the defendant from responsibility upon the bond. He that excuses a non-performance, supposes it: *Meredith v. Allen*.

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If this view of the pleadings be correct, then the plaintiffs will be entitled to judgment *non obstante veredicto* upon the confession in the rejoinder of the plaintiffs' cause of action, notwithstanding the verdict on the immaterial issue. Had the matter of this rejoinder been originally pleaded as a defence, instead of the fifth plea (supposing such defence to be insufficient in substance), the plaintiffs would, I apprehend, be entitled to judgment notwithstanding the verdict found upon the issue tendered by it, on the ground of the confession of the cause of action which it contains. And, if that be so, I can see no reason why the existence upon the record of the plea which has been departed from and abandoned as the ground of defence, should deprive the plaintiffs of the benefit of this confession.

If the rejoinder to the replication to the fifth plea does not contain such a confession of the plaintiffs' cause of action as to entitle them to judgment thereon, I am not aware of any pleading on this record by which it is more distinctly confessed. Supposing, therefore, that no such confession appears, the remaining question will be, whether, notwithstanding the verdict found for the defendant upon the immaterial issue tendered by this rejoinder, the plaintiffs are not

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entitled to judgment upon the rest of the record. Before the statute of *Anne*, which allowed defendants to plead several pleas, a motion for judgment *non obstante veredicto* could only be founded on the confession contained in the same plea on which the issue arose. “If,” as Lord Chief Justice *Tindal* says, in *Goodburne v. Bowman* (e), “such plea did not contain a confession, there was no part of the record by which the deficiency could be supplied.” If, however, several defences are pleaded, one of which is wholly insufficient and incapable by amendment of being made a good defence, and upon which therefore no repleader ought to be awarded; and other defences are well pleaded, upon which material issues are joined and found for the plaintiffs; I do not see any good reason why the plaintiffs should not be allowed to take advantage of the finding upon those issues, in the same manner as they might do if the ineffectual defence had not appeared upon the record. In *Goodburne v. Bowman*, the Lord Chief Justice further says: “In the present case, there is a verdict on the general issue, which finds that the defendant did publish the libels. And although, in considering the merit or demerit of any individual plea, recourse cannot be had to another unless expressly referred to by such plea; yet, as the application to enter a verdict is founded on the whole record, by which it appears that the defendants have committed the grievance complained of, and have not shown any sufficient justification, it may be considered in that point of view, that there is enough to warrant the application.” In that case, indeed, the Court thought that the special pleas did sufficiently confess the action, but

(e) 2 M. & Scott, 713.

did not sufficiently avoid it; but if the principle above mentioned be correct, the plaintiff may avail himself of a finding by the jury, as well as of a confession of the defendant, notwithstanding a verdict for the defendant upon an immaterial issue; provided a repleader ought not to be awarded; and it must be observed that the Lord Chief Justice took care to show that the defendants were not in that case entitled to a repleader.

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Then how does this case stand upon the record? The plaintiffs declare upon a bond: over is demanded of the condition: the execution of the bond is denied by the defendant, and found for the plaintiffs. Then performance of the condition is pleaded, to which the plaintiffs reply a breach, by non-payment of money to the Receiver-general. The defendant in his rejoinder alleges payment; on which an issue (the ninth) is joined, and found for the plaintiffs to a certain amount, viz. 693 *l.* Fraud and covin in obtaining the bond are pleaded, which are negatived by the jury. Two other pleas are demurred to, upon which judgment is given for the plaintiffs. No material issue either in law or fact has been found for the defendant. But an immaterial issue is found for the defendant, arising upon a rejoinder which is defective, not merely in form, but in showing any answer to the plaintiffs' right of action, capable of being made good by any amendment in form. If this pleading had not been brought upon the record, the plaintiffs would have been entitled to judgment. Upon what principle, then, are they to be deprived of the benefit of all that has been established in their favour, in consequence of a proceeding which is wholly ineffectual, entitling neither the plaintiffs nor the defendant to judgment? And why may not such

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a proceeding be disregarded as altogether nugatory? Authority upon the subject is not to be looked for in the older Books, since no such case can have arisen before the statute of *Anne*, already referred to. The only modern case upon the point of which I am aware is that of *Goodburne v. Bowman*, the principle to be collected from which is that, where a verdict is found upon an immaterial issue in a case which does not authorise the award of a repleader, and the whole cause of action is confessed or proved upon some other plea or pleas on the same record, the plaintiffs are entitled to judgment. This case was adverted to in *Plummer v. Lee* (*f*); and though the principle is said to have been suggested in *Goodburne v. Bowman* for the first time, the justice of it is not controverted, but the case is distinguished from that before the Court, on the ground that in the latter no plea contained a confession of any part of the cause of action, and there was no issue (found) upon any plea establishing the truth of the whole of it: and a repleader was awarded. The principle promulgated in *Goodburne v. Bowman* appears to me to be consistent with reason and justice.

The award of a *venire de novo* to try the immaterial issue would be wholly useless; and as this is not a case for a repleader, I humbly offer my opinion to your Lordships, though certainly not without hesitation, in consideration of the novelty of the case, and in deference to the opinions entertained I believe by my learned brothers, that judgment may be entered for the plaintiffs upon the whole record, on the ground that the issues found thereon contain sufficient proof whereon to found a judgment for the plaintiffs, disregarding the immaterial issue.

(*f*) 2 M. & Welsby, 495.

Mr. Baron *Parke*:—My answer to the first question proposed by your Lordships is, that in the case suggested the conduct of *A. B.* was a breach of the condition of the bond, by which he was “well and truly” to pay to the Receiver-general all the sums of money collected by him, according to the true intent and meaning of the statutes 43 *Geo.* 3, c. 99, and 3 *Geo.* 4, c. 88.

It seems to me that this condition is to be construed precisely in the same way as if another person had been collector for a former year, the appointment being annual; and it could not admit of the least doubt but that it would have been a breach of such a condition if the money received, instead of having been paid to the Receiver-general to the account of the year for the year for which it was received, had been lent to a former collector, to enable him to pay his arrears, although that collector had really so applied it. The question is precisely the same, so far as relates to the breach of the condition of the bond; and the payment to the account of a wrong year is in effect an appropriation by *A. B.* to the payment of his own debt; though certainly the damage is not the same, from the circumstance of this debt being due to the public, as if he had applied it to the payment of a private debt of his own. It makes, however, a most material difference to the parishioners, who are a fluctuating body, whether the collections of each year are paid to the account of that year or to that of a former year, for which the same person has acted as collector. In the latter case suspicion is lulled, and no inquiry made until the sureties of the former year, or the collector himself, are dead or insolvent; and the inhabitants of the parish are rendered liable for the arrears due from their predecessors, and have the amount levied upon them—an evil which might

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have been avoided if each year's collection had been duly paid, as it ought to have been, to the account of that year.

In answer to the second question proposed to Her Majesty's Judges, I have humbly to state the same opinion which I did in the Court below : that it is no defence to the action on the bond that the defaulter had lands and goods within the district, and that the Commissioners had knowledge of their existence before the action brought, and did not before suit seize and sell them. This question depends entirely on the proper construction to be put on the 43 *Geo.* 3, c. 99, s. 13, coupled with other provisions of that statute.

The 13th section of the 43 *Geo.* 3, c. 99, enacts that security shall be given by collectors by bond, with sureties, if required by the Commissioners, and that "every such bond given by way of such security as aforesaid shall be prosecuted by such Commissioners, on any failure or default by the collector : " provided always that "no such bond shall be put in suit against any surety for any deficiency other than what shall remain unsatisfied after sale of the lands and goods of such collector, in pursuance and by virtue of the directions and powers given to the respective Commissioners by this Act." These directions and powers are contained in section 52, by which, in case of default by a collector in paying the money received by him, the respective Commissioners, or any two of them, in their respective jurisdictions, are empowered and authorised (not required) to imprison his person, and seize and secure the estate, both real and personal, belonging to him or which shall descend or come to the hands or possession of his heirs, executors, or administrators, wheresoever the same can be discovered and found ; and the Commissioners

who shall seize and secure the estate shall appoint a time for a meeting of all the Commissioners, who are empowered and required to sell and dispose of the collector's estate, to satisfy the arrears and costs, if the collector does not pay.

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These being the material provisions of the statute, it seems to me—first, that according to their true construction, it is discretionary in the Commissioners whether they will seize or not; and that if they do not choose to seize, they may put the bond in suit; and that the proviso does not operate unless they do seize—and, secondly, that if the proviso be obligatory on the Commissioners in all cases, it does not constitute a condition precedent, but is directory only.

The 52d section, of which I have stated the substance, appears to me to leave it clearly in the discretion of the Commissioners whether they will seize the estate or not: they have the power of determining whether it is worth while, considering the nature of the property, its probable value, and the difficulty and expense of obtaining and converting it, to put in force the power of seizure. The proviso, therefore, in the 13th section, which expressly refers to the directions and powers in the 52d section, and which are discretionary, ought to be read just as if the former section had provided that the bond should not be put in suit for any deficiency other than such as remained after sale of the estate, real and personal, pursuant to the discretionary power vested in the Commissioners by the 52d section; that is, “if the Commissioners should think fit, in their discretion, to seize the estate, real and personal.” If this is not done, this consequence will follow—that the Commissioners, who have a discretion by the 52d section, and that, no doubt, for the benefit of the parish at

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large, and the public, and all persons interested, to seize or not, are yet compellable to do so, under the penalty of not being able to sue on the bond for the deficiency if they do not: so that, if they in their discretion think the public interest and the interests of all best consulted by not incurring the expense of a seizure of property of no value, the public must suffer by losing the remedy on the bond against the sureties; for it is in truth their loss. If the Commissioners took this bond and were acting for their own benefit, there might be some reason for saying that, if they did not choose first to take the estate of the principal, they should not sue the surety; but if they act, as they do, not for themselves but for the public, it appears to be impossible to preserve the discretion given by the 52d section, without qualifying the 13th section, and making the proviso therein a contingent direction or order not to sue, if the discretion should be exercised, until the sale should have been completed. I am therefore of opinion that this proviso in the 13th section has no operation, unless the Commissioners choose to seize under the powers of the 52d section.

But if this construction be not correct, and the proviso is obligatory on the Commissioners in all cases, then arises the other question—is the compliance with the enactment a condition precedent, and the non-compliance a bar to the action? I must say that I am of opinion that it is not. In the first place, the language of the proviso is, not that no action shall lie or be maintained on the bond, but it comes by way of qualification on the former part of the clause, which commands the Commissioners to prosecute the bond on any failure or default. It is, therefore, a command to them not to put the bond in suit

in the particular case contemplated by the proviso; but it is no more. Had the Legislature intended to make the non-compliance with this regulation an absolute bar, I cannot help thinking they would have used different language. But it is not on the use of the precise expression that I place so much reliance, as on the consideration of the consequences to which the construction contended for would lead. If we construe the words literally, and say therefore that no action is maintainable unless they seize and sell the lands and goods of the defaulter, whether they have knowledge, or by reasonable inquiry could obtain the knowledge of them or not, no action could be safely brought; and the public, whose suit it is, would be defeated of their remedy by proof of the collector having any interest whatsoever, in possession or reversion, however remote, in lands, or any goods, however small in value (and there is none, however poor, who has not some), in any place within the jurisdiction of the Commissioners, or even without it; for it may be made a question whether, under the 52d section, their power does not extend to lands and goods anywhere. This construction would operate practically to defeat the remedy on the bond altogether. The consequences, therefore, to which such a construction would lead, at all events would require some implied exception in the provision of the statute; and it is, I understand, conceded by many of my learned brethren that it cannot be a condition precedent in all cases. If the Commissioners have notice or knowledge of the existence of such lands or goods, it is said that the sale must be a condition precedent; otherwise not: but if so, can we say that, if they could with reasonable diligence ascertain their existence, the sale should not in that

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case also be a condition precedent? There is a difficulty in drawing a distinction between the two cases; and much difficulty also in determining the fact of knowledge or of the power to ascertain the existence of lands or goods. Is such knowledge or power of one of the Commissioners (a somewhat numerous body) to be sufficient? These inconveniences and difficulties, coupled with the want of a direct and positive enactment that the sale shall be a condition precedent, induce me to think that the proviso (if not discretionary, of which I have said enough), was directory only to the Commissioners who act, to take all proper steps in the first instance. It does not follow, because it is directory, that it is not obligatory: and I conceive that, for the non-compliance with that proviso, there would be a remedy either at law or in equity; though the want of such remedy would not, as it seems to me, necessarily prevent the clause from being construed to be directory.

For these reasons, I cannot help thinking that the Legislature did not intend the proviso in question to be a condition precedent, and that the existence of lands or goods unsold, should under any circumstances be a bar to the action.

My answer to the second question which your Lordships have proposed, includes an answer to the third. For the reasons I have given before, I think that it is no defence to an action on the bond, that the Commissioners did not seize and sell lands or goods of the defaulter, of the existence of which they had no knowledge, before the commencement of the suit.

To the fourth of your Lordships questions, my answer is, that, in the case supposed, the verdict ought to be entered, on the issue raised by the rejoinder, for the defendant.

The plea (the fifth) is in substance (in as far as it is material to state it), that the collector performed so much of the condition of the bond as relates to the receiving all the monies assessed from the persons liable; and, as to his deficiency in accounting for what he received, that he was possessed of and entitled to divers lands and goods as of his own property, within the jurisdiction of the Commissioners, of which the plaintiffs had notice, and which lands and goods still remain unsold. The replication to this plea is, that the collector, after this breach of the condition, had no lands within their jurisdiction which the Commissioners could seize and sell, of which they had notice. The rejoinder drops all mention of the notice, and simply avers that there were lands which the Commissioners could and might have seized and sold; and concludes to the country; and the plaintiffs add the similiter. I think this issue was, for reasons I shall afterwards give, wholly immaterial, or rather, in reality, no issue at all; and if a Court of Error had a power to award a repleader, it ought to award it: but I think the jury ought, upon the fact found, which is that there were lands which the Commissioners could have seized and sold, to have found for the defendant; for that is the averment he makes in tendering the issue.

But supposing the verdict to be so entered, then, upon the supposition contained in your Lordships' fifth question, I am of opinion that this was an immaterial issue, upon which a repleader ought to have been awarded (confining my opinion at present to the question on the fifth plea, and the pleadings arising out of it), if the Court of Error had power to do so; but that judgment *non obstante veredicto* cannot be entered for the plaintiffs.

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The principle upon which such a judgment proceeds as against a defendant, is, that he has confessed the plaintiff's action, and avoided it by matter which is in substance no answer to the plaintiff's action; and in such a case, although the issue raised upon that matter has been found for the defendant, yet the Court gives judgment for the plaintiff as upon a confession. There are four descriptions of judgments for a plaintiff—on verdict, demurrer, *nil dicit*, and confession; *Rex v. Phillips*(g): and this belongs to the last, and is classed under that head; and all the cases in the Books, which I have been able to find, are founded on that principle. Thus, in the form referred to by my brother *Coltman*, [14 *Viner's Abridgment, Judgment*, (D.), pl. 1], the judgment proceeds upon the confession in the plea of the matters in the declaration, and want of sufficient matter in bar. The same in *Carthew*, and other authorities(h). The cases of *Lacy v. Reynolds*(i), *Rex v. Philips*(k), *Drayton v. Dale*(l), *Earl of Lonsdale v. Nelson*(m), *Lambert v. Taylor*(n), *Clears v. Stevens*(o), *Lewis v. Clement*(p), and *Rickards v. Bennett*(q), are all cases of judgments on pleas in confession and avoidance bad in substance: for, if bad in form merely, such a judgment will not be given; *Staples v. Haydon*(r). And, after a very diligent search, I have not been able to discover a single case of this species of judgment on any other pleas than those which are technically in confession and avoidance.

(g) *Strange*, 395.

(h) *Carth.* 372; 2 *Roll's Abridgment*, 99; *Willes*, 365, 366.

(i) *Cro. Eliz.* 214.

(k) *Str.* 394.

(l) 2 B. & C. 293; 3 D. & R. 534.

(m) 2 B. & C. 312; 3 D. & R. 556.

(n) 4 B. & C. 138; 6 D. & R. 188.

(o) 8 *Taunt.* 413.

(p) 3 B. & A. 704.

(q) 1 B. & C. 223; 2 D. & R. 389.

(r) 2 *Lord Raym.* 924; 6 *Mod.* 10; 2 *Salk.* 579; 3 *Salk.* 121.

It is said that, if a plea traverses one out of several matters alleged in the declaration, it confesses the remainder to be true; and in like manner the rejoinder confesses such part of the replication as it does not deny. But I do not think it confesses the remainder in the sense which is required to found such a judgment; *Hudson v. Jones*(s). That which is traversable, and not traversed, may be said no doubt to be admitted for some purpose; that is, it cannot be made a matter in dispute on the trial; and if it were taken by protestation under the form of pleading, before the new rules, the matter would have been equally put out of the issue: but there would have been great difficulty in maintaining that this was a confession for the purpose of giving the plaintiff judgment. The effect of a traverse of one fact out of many is merely this—that the party pleading rests his defence on a denial of that fact only; but if the decision of it in favour of the defendant turns out to be immaterial, I conceive the Court cannot give judgment as on a confession of the other facts. I am fortified in this opinion, not merely by the absence of any authority to warrant such a judgment, but by some cases of a similar nature, in which the Courts have decided that a repleader ought to be awarded. For if the position be true that a defendant confesses that fact in a declaration or replication which he does not deny, it must be equally true of a plaintiff denying one matter which is immaterial, out of several matters in a good plea; and yet, in a case like this, Lord *Holt* says, in *Pitts v. Polehampton*(t), there must be a repleader. In *Serjeant v. Fairfax*(u), or *Serjeant v. Madox*(x), which was an action of debt for rent against the assignee of the

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(s) 1 Salk. 91. (u) 1 Lev. 32.
 (t) 1 Ld. Raym. 391; S. C. nom (x) 1 Keble, 23.
Witts v. Polehampton, 3 Salk. 305.

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lessee (as it seems from the latter report), the plea was, that the defendant assigned over to a stranger, with the consent of the plaintiff; and the issue was on the consent; and, after verdict, whether for the plaintiff or defendant is uncertain, a repleader was awarded. The case is reported several times in *Keble*, and this appears to be the result: but I must own that no great weight ought to be attached to this authority, from the inaccurate mode in which it appears to have been reported. In a recent case in the Exchequer—*Plummer v. Lee*(y)—the Court decided that, where the defendant traversed an immaterial averment, there could not be judgment *non obstante veredicto*, but that there must be a repleader.

For these reasons, I cannot help thinking that, if the replication in this case had averred two distinct facts, and the rejoinder had traversed one which was immaterial, and was found for the defendant, it would not have admitted the other, so as to warrant a judgment *non obstante veredicto*. But even if it were so, the doctrine would not apply to such a case as this; for, here, in truth, the issue is immaterial—one on which no judgment can be given; not because an immaterial fact is traversed, but because there is in reality no issue at all, no affirmance on one side of the same proposition which is denied by the other: and the case belongs to a numerous class of immaterial issues which are to be found in the Books, where issue is taken by one party on that which is not alleged by the other. I would instance the case of *Enys v. Mohun*(z), which was an action against the assignee of a lease, to whom the estate of a lessee had come by assignment, and the plea was that the lessee did not assign to the

(y) 2 M. & Welsby, 495; 5 Dowl. Prac. Cas. 755.

(z) Str. 847; 1 Barnardiston, 182. 220.

defendant; and, after issue joined, a repleader was awarded, it being an issue joined on what was not alleged in the declaration: and the cases in *Gilbert's* C. P. 48, *Sandback v. Turvey* (a), and *Walker v. Brook* (b), all afford instances of the same kind. In the present case, the replication is, that the collector had not any lands of which the Commissioners had notice; which pleading is bad on special demurrer, as being a negative pregnant, that is, an issue that rather supposes an affirmative than the contrary; but good after verdict; *Gilb. C. P.* 153. If the replication had been proper, it should either have denied that there were lands, or admitted that there were, and averred that the Commissioners had no notice of them: but this informal replication does not deny that there were lands, nor does it admit that there were; but it means in effect this—either that there were no lands, or, if there were, that the Commissioners had no notice of them. The rejoinder contains no answer to this proposition, but avers simply that there were lands—a fact that was never denied by the plaintiffs; and on this ground I am satisfied that this is a purely immaterial issue (more properly, no issue at all), which is not cured by verdict, upon which no judgment can be given, and for which, in the Court below, a repleader ought to have been awarded.

In answer to the sixth question proposed by your Lordships, I have to state that, in my opinion, it is not competent for a Court of Error to award a repleader. Upon this point we have the express authority of Lord *Hale*—*Holbech v. Bennet* (c),—who said that that course had then been disused more than one hundred years, and could no longer be practised. To

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(a) Cro. Jac. 585.

(b) 1 Lord Raym. 133.

(c) 2 Saund. 319 a.; S. C. nom.

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the same effect is *Crosse v. Bilston* (d) ; and I believe no instance can be found in recent times of such a proceeding. The reason for this probably is, that the authority given by the writ of error is confined to giving judgment, whether of reversal, affirmance, or *venire de novo*, on the existing record ; and that the parties are not before them to replead. They have no day in court, and are not necessarily present when the judgment is pronounced. The defendant in error has the means of compelling the plaintiff in error to assign errors, by *scire facias quare executionem non* ; and the plaintiff in error may oblige the defendant to appear and join in error, by *scire facias ad audiendum errores* ; or the defendant may come freely : but, this done, the record in error does not usually state the presence of both parties when judgment is given ; and judgment may certainly be affirmed in the absence of the defendant, as is stated by *Powell, J.* in *Staple v. Heydon* (e). Be this as it may, there is no doubt but a Court of Error does not now possess that power. If a Court of Error could award a repleader, I think it ought to do so in this case.

I think the answer to the seventh question proposed by your Lordships ought to be, that the judgment should be for the plaintiffs *non obstante veredicto*, on the ground that the fifth plea confessed the right of action on the bond, and did not avoid the same by sufficient matter ; that is, that the judgment should be affirmed. But if I am wrong in supposing that the sale of the lands was not a condition precedent, then I am of opinion that the judgment for the plaintiffs below ought to be reversed simply ; and they must begin *de novo*. I do not think that any aid can

(d) 6 Mod. 103.

(e) 6 Mod. 9.

be lawfully derived from the other pleadings in this case, though I am not prepared to say that it may not in some cases. It was said in *Goodburne v. Bowman* (*f*), and very truly, that “most of the cases in which the question respecting a repleader has been considered, were before the statute of *Anne*, when only one plea could be put upon the record;” and that, “if such plea did not contain a confession, there was no part of the record by which the deficiency could be supplied.” The Lord Chief Justice proceeds to state, that, in that case, there was “a verdict upon the general issue;” and that, although, in considering the merit or demerit of any individual plea, recourse cannot be had to another, unless expressly referred to by such plea; yet, as the application to enter the verdict is founded upon the whole record, upon which it appears that the defendants have committed the grievance complained of, and have not shown any sufficient justification, it may be considered, that, in that point of view, there is enough to warrant the application”—for judgment *non obstante veredicto*; and that “no rule is better established than this, that the Court will not grant a repleader, except where complete justice cannot be answered without it;” and he cites *Symmers v. The King* (*g*) as an authority.

This doctrine so laid down by the Chief Justice is I believe new. At first, I felt considerable doubt as to its being well founded: but it is extremely convenient and reasonable; and I am not prepared to say that any valid objection can be made to it, provided it be explained and qualified in the manner I will mention: but unfortunately that qualification will exclude the present case. Where it applies, a

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(*f*) 9 Bing. 52; 2 M. & Scott, 713.

(*g*) Per Ashhurst, J., Cowp. 510.

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new mode of entering up the judgment upon the record would be required, treating the issue found for the defendant as immaterial, and proceeding, notwithstanding the verdict on that issue, to give judgment upon the other issue found for the plaintiff. Nor am I satisfied that the doctrine laid down by the Chief Justice would not apply to a case in which the other issues, one or more, being each material and decisive of the whole cause of action, are each found for the plaintiff, although they severally or together did not confess or traverse all the material facts alleged in the declaration: for it may be well said that a repleader is to be granted, to enable the parties to plead properly such a plea as would be decisive of the action; and if they have already done so, under the power given by the statute of *Anne*, and raised one or more correct issues, each of which would decide the action, and the Court may give judgment on the finding on the material issue or issues, such a course is unnecessary: and I am disposed to think, on that ground, after full consideration, that the Court of Exchequer was wrong in awarding a repleader in the case of *Plummer v. Lee*, already referred to; although it would have been rightly awarded, if the only plea had been, the traverse of the immaterial fact alleged in the declaration. But I am of opinion that this doctrine will not help the plaintiffs in this case; because the matter of the fifth plea has never been tried at all by a proper issue. The defendant had liberty to plead that plea, and has a right to all the benefits of it; and if it be good in point of law (which for this purpose I must assume), he had a right to have the facts properly disposed of by a proper issue. This has not been done: as the issue was found in his favour, he would have a right to ask for a repleader

if the plea stood alone, and cannot be deprived of that right if it is joined with others.

I am therefore of opinion, that, assuming the fifth plea to be good, the other pleadings would not help the plaintiffs, and the judgment ought to be reversed.

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Mr. Justice *Vaughan*:—I have considered with (*Vaughan, J.*) attention the various questions which in this complicated case your Lordships have propounded to the Judges; some of which, being “*inter apices doctrinæ placitandi*,” might be expected to provoke much difference of opinion. I have found great difficulty in bringing my mind to a satisfactory conclusion upon some of them; which may cease to be matter of surprise when it is remembered, that, after the most anxious consideration, not only have different Judges taken different views of the same questions, but the same Judges, after much deliberation, have found themselves constrained to give different judgments upon the same question, as the case has proceeded through its several stages in the Courts below.

To the first question, which appears to be the most easy of solution, I answer that the conduct of *A. B.*, under the circumstances stated, in paying over to the Receiver-general any part of the monies collected by him for the year 1828, to be applied to the service and account of former years, was a direct breach of the condition of the bond. But, as the case of a surety has ever been regarded with favour both in Courts of Law and Equity, his liability must be demonstrated. He has executed a bond with a condition, by which he stipulates, that, on *A. B.* being appointed collector of the taxes for the district in question for the year 1828, he will be responsible for

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his collecting, and well and truly paying over to the Receiver-general, all such monies as shall come to his hands by virtue of the assessments of that year. True it is that *A. B.* did faithfully collect all the sums due upon those assessments, and did pay them over to the Receiver-general; but with a specific appropriation of part, viz. 693*l.*, to the account and service of a former year, for which year the defendant below was not his surety.

Adverting to the provisions of the Act 43 *Geo.* 3, c. 99 (so often referred to), which creates and defines the obligations and duties of the collector and of his surety, I am of opinion that *A. B.* thereby incurred a forfeiture of the penalty of the bond. But, in looking at the general frame and context of the Act of Parliament, one cannot fail to observe that the duties and the responsibility of the collector and his surety are several and distinct, expressed in different terms, and depending upon very different provisions. The office of each is an annual office; and, in considering the questions submitted to us, we must carefully avoid confounding the duties of these respective officers for any one particular year, with the duties of any prior or subsequent year. It may happen accidentally, but not necessarily, that the collector of the preceding year may also be appointed collector for the subsequent year; and that the surety of the former year may chance to become the surety for the collector of the following year; and so *vice versâ*. The principal, or collector, engages that he will duly collect, and well and truly pay over to the Receiver-general, all sums received by him by virtue of the assessments made in the year 1828, to the service and account of that particular year; and the surety becomes responsible for the faithful discharge of this duty: but if,

instead of paying over the sums collected in 1828 to the service and account of that year, the collector causes the same, or any part of them, to be applied to the extinction or liquidation of an arrear which he had suffered to accumulate in any former year, I have no hesitation in declaring that he becomes as much a defaulter to the extent of such misappropriation as if he had applied the money to the payment of his own private debt; and *pro tanto* the parish becomes liable to be reassessed to make good such deficiency, and may resort to the surety for indemnification to the extent of the default. Whether this conduct of *A. B.* amounted to a breach of the condition of the bond, cannot, in my humble judgment, be tried by a more infallible test than that suggested by my brother *Parke*, in delivering his judgment in the Exchequer Chamber, wherein he observes that the condition of the bond is to be construed as if another person, and not *A. B.*, had been collector for a former year: and could it then admit of any doubt that it would be a breach of the condition “to pay well and truly to the Receiver-general,” if the money had been lent by *A. B.* to such former collector to enable him to pay his arrears, although the money had been so applied? It is in effect, for this purpose, an appropriation by *A. B.* to the payment of his own debt. To my mind, this proposition involved in the first question appears so plain, and so directly in unison with the opinions (I believe) of all the Judges (whatever difference may be found to exist in the answers to be returned to some of the subsequent questions), that I cannot prevail upon myself to waste more of your Lordships’ valuable time upon the consideration of it.

The second question opens a more extended field of discussion, and is calculated to excite much greater

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difference of opinion. We are told that *A. B.*, at the time of the supposed breach of the condition of the bond, had certain lands and goods within the jurisdiction of the Commissioners, of which they had knowledge, before any action brought upon the bond: and we are asked whether, an action being brought, it would be a defence to that action, that the Commissioners did not before suit seize and sell the said lands and goods.

The answer to this question seems to depend upon establishing the proposition that such seizure and sale was a condition precedent which must be complied with before the surety can be sued; and whether it be such a condition precedent must be determined by the true construction of the proviso in the 13th section of the 43 *Geo.* 3, c. 99, regard being had, at the same time, to the power and authority given to the Commissioners by the 52d section to deal with the person and property of the collector making default. It has been argued, and I think correctly, that the clause enabling the Commissioners to seize the lands and goods of the collector, is not imperative, but directory only, and is not a step necessarily preliminary to putting the bond in suit against the principal. But I conceive that the Legislature has drawn a distinction, and expressed it in words too plain to be mistaken, between the liability of the principal and of the surety, and has with the most guarded caution placed the responsibility of the latter upon the more favoured footing. After directing the form of the bond to be taken from the surety, that section (s. 13) proceeds to enact that "every such bond given by way of security shall be prosecuted by the Commissioners on any failure or default of the collector:" but accompanied and followed by this remarkable

proviso, which I regard as the inducement or consideration influencing the mind of the surety to enter into the obligation, viz. : “ Provided always, that no such bond shall be put in suit against any surety for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods and chattels of such collector, in pursuance and by virtue of the directions and powers given to the respective Commissioners by this Act.” If this proviso, admitted on all hands to have been introduced for the sole purpose of giving protection to the surety, and of easing the burthen of his obligation, does not disarm the Commissioners of any power to call him to account until the deficiency of the collector has been ascertained, after giving credit for the proceeds resulting from the sale of his lands and goods pursuant to the powers in the 52d section, in reduction of the balance, I ask what language could be devised more clear to convey the notion of a strict condition precedent than the words of this proviso. ‘To my mind this is a solemn declaration made by the Legislature (contemplating the reluctance with which persons might become sureties in bonds of this description) that whoever executed them should not be prosecuted for the default of the collector, until after the Commissioners had first seized and sold all the real and personal estate of the collector of which they had any knowledge ; and that the Commissioners, having given credit for the proceeds in reduction of the debt, might then, and then only, enforce the bond against the surety. How far the neglect or failure of the Commissioners to exercise the powers delegated to them of proceeding against the lands and goods of the principal, for the purpose of making them available in diminution of the debt or balance to be after-

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wards claimed against the surety, may render them obnoxious to any proceeding by mandamus, or by suit in Equity, or otherwise, we are not called upon to discuss: but, surely, their neglect to discharge the trust reposed in them affords no just ground for prematurely accelerating the liability of the surety. So harsh a construction of the proviso in the 13th section would be fraught with injustice, and virtually operate as a fraud upon the surety. I am therefore of opinion, upon the plain letter of the Act of Parliament, upon the clear intention of the Legislature, to be collected from the whole frame and spirit of its various enactments, and upon the reason of the thing, that the neglect of the Commissioners to seize and sell the lands and goods of the collector of which they had knowledge, before the action was commenced, would, if properly pleaded, afford a good ground of defence to such action.

To the third question, which assumes the want of knowledge in the Commissioners, and their ignorance of the fact of the existence of any lands or goods belonging to the collector within their jurisdiction, before the commencement of the suit, I answer, *De non existentibus et de non apparentibus eadem est et ratio et lex*. Upon this short ground, and on this plain and sound principle, I am of opinion that this defence of the surety must fail, where the Commissioners have had no notice.

Whether the issue raised by the rejoinder to the replication to the fifth plea ought to have been found for the plaintiffs or for the defendant, depends upon the matters involved in that issue. If the rejoinder, not having traversed the fact of notice to the Commissioners, a most important part of the issue tendered by the replication, can be considered as having

the legal effect of impliedly admitting the want of notice to the Commissioners of there being any lands, &c. of *A. B.* within their jurisdiction before the commencement of the action, I think that the verdict on that issue should have been found for the plaintiffs. But I cannot satisfy my mind that the defendant below, by his rejoinder, can be taken to have made any such admission. The allegation in the replication that the Commissioners sold all the lands of *A. B.* of which they had notice, is one entire and substantive allegation, the whole of which the defendant might and ought to have traversed; but, by omitting one very essential part of it, he has raised an immaterial issue (if any issue be raised), in which I think the fact of notice not involved. Taking this view of the subject, the finding of the jury that *A. B.* had lands, &c., properly affirms all that was put in issue, and therefore entitles the defendant to have it entered in his favour; but, as it is an immaterial issue, what are the legal consequences resulting from such finding of the jury, will be seen in the answer to the subsequent questions.

If I am correct in supposing that the verdict should be entered for the defendant upon the issue raised by the rejoinder to the fifth plea, and that it would be no defence to the action that the lands of *A. B.* were not sold by the Commissioners, unless they had notice of their existence, I think that judgment might be entered for the plaintiffs *non obstante veredicto*, provided the fifth plea can be considered as amounting to a confession of the cause of action, and an insufficient avoidance of it. The rule as applicable to cases of this description is laid down with great precision and perspicuity by Lord Chief Justice *Abbott*, in *Lambert*

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v. *Taylor* (h). He says, "The plea being bad, the defendant certainly cannot have judgment, although the issue is found for him, the issue being taken on an immaterial matter : and the question, whether the plaintiff can have judgment, or whether there ought to be a repleader (supposing the Court competent to award a repleader), depends upon the question whether the plea does or does not contain a confession of a cause of action : if a cause of action be confessed by the plea, and the matter pleaded in avoidance be insufficient, the plaintiff is entitled to judgment notwithstanding the verdict." The same rule was recognised and confirmed by the Court of Common Pleas in the case of *Goodburne v. Bowman* (i), and by the Court of Exchequer in *Plummer v. Lee* (k).

Let us apply this test to the fifth plea. That plea states that *A. B.* did well and faithfully demand and collect all the sums of money charged in the said assessments ; and then avers that he was possessed of and entitled to certain lands within the jurisdiction of the Commissioners, of which the plaintiffs had notice, and which they might have seized and sold to satisfy the sums so collected and detained, or not duly paid over, by him in pursuance of the bond. This plea confesses a cause of action, and contains matter in avoidance of it, capable of being moulded into an issue which, properly framed, would have determined the merits of the case. But mark the mode in which the plaintiffs deal with this plea in their replication. They state, that after *A. B.* had collected the sums assessed, and omitted to pay them over to the Receiver-

(h) 4 B. & C. 152 ; 6 D. & R. 188.

(i) 9 Bing. 532 ; 2 M. & Scott, 700.

(k) 9 M. & Welsby, 495 ; 5 Dowl. 755.

general, he had no lands within the jurisdiction of the Commissioners which they could seize and sell, of which the plaintiffs had notice. Without discussing the question whether the plaintiffs' replication was not inartificially drawn, and open to a special demurrer, inasmuch as it traverses, not the single fact whether *A. B.* had land within the jurisdiction of the Commissioners, nor the fact, simpliciter, whether the plaintiffs had notice, but the compound proposition, that he had no lands of which the plaintiffs had notice. Perhaps the more correct mode of replying to a plea so framed would have been either to have traversed the fact of *A. B.* having lands, or the fact of the plaintiffs having had notice; the one or the other, but not both; the failure to maintain either being fatal to the defendant's bar.

Such being the plea and the replication, the defendant rejoins that *A. B.* had lands within the jurisdiction, omitting to traverse so essential a part of the issue tendered by the replication as the fact of notice. It appears to me that the plaintiffs might have demurred to this rejoinder, as tendering an immaterial issue (if not amounting to a departure), passing by and losing sight altogether of the fact of notice, upon which the strength and sufficiency of the bar rested. Instead of doing so, they have countenanced this error, and concurred, by adding the similiter, in sending an issue to be tried by a jury, which cannot dispose of the merits of the case. How then is the verdict to be entered on this issue? With unfeigned deference to the opinion of others, I conceive, as I have before stated, that the verdict should be entered for the defendant, the jury having found the only fact involved in it in his favour, viz. that *A. B.* had lands within the jurisdiction of the Commissioners.

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There being, therefore, a plea upon the record which confesses a cause of action, and which contains matter in avoidance of it which might have determined the rights of the parties, but which has failed to do so from their mutual neglect to observe the rules of good pleading, I think the plaintiffs are not entitled to enter up judgment *non obstante veredicto* upon a supposed implied confession in the rejoinder, that if there were lands within the jurisdiction of the Commissioners, the plaintiffs had no notice of them. For the other reasons suggested by my brother *Coleridge* and the very learned Baron *Parke*, I agree that the neglect of the defendant to traverse the fact of notice does not amount to any such implied admission of it.

Supposing the judgment could not be so entered, and the issue raised by the rejoinder be (as I apprehend it must be) adjudged immaterial, we are called upon to declare our opinion upon the jurisdiction of a Court of Error to grant a repleader, and upon the expediency of doing so in the case before us. I believe it has been a prevalent notion in *Westminster Hall* of late years, that a Court of Error cannot award a repleader: and the neglect or forbearance to exercise this right through a long succession of years, is strong evidence against the existence of it. Since the statute of *Anne*, which allowed defendants any number of pleas the Court might be pleased to sanction, and since the practice of granting new trials has grown into daily use, the awarding of a repleader, even by the Courts below, has become a rare occurrence; inasmuch as the Court from whence the record issues is likely to render such proceeding unnecessary. In the case of *Bennet v. Holbech* (*l*), *Holbech v. Bennett* (*m*), Lord *Hale* is reported to have said, that in ancient

(*l*) 2 Saund. 319 a.

(*m*) 2 Lev. 12.

times it was usual to award a repleader on a writ of error from the Common Pleas to the King's Bench, and that he had searched and found several rolls, not less than seven in number (the earliest in the 21 *Edw.* 1, and the latest in the 33 *Edw.* 3), in which a repleader had been so awarded; but he adds, it was grown obsolete and not in use at that day. I am not aware that the jurisdiction of a Court of Error to award a repleader (assuming it once to have existed) has ever been abolished by any legislative enactment, or declared illegal by any judicial decisions. But since the time of Lord *Hale* more than a century and a half has elapsed, and sunk the practice (if ever it existed) into absolute desuetude, and involved the right in deeper obscurity. I cannot, therefore, venture to affirm the jurisdiction of a Court of Error to award a repleader, and consequently cannot assert the expediency of doing so in this case.

This leads me to the last, and the only remaining question, viz. what judgment ought to be pronounced, supposing a Court of Error cannot or do not award a repleader: to which I answer, in a word, that judgment cannot be pronounced for the defendant, because the issues found for him are immaterial issues: neither, as it appears to me, can judgment be pronounced for the plaintiffs on the whole record, or on the fifth plea *non obstante veredicto*, for the reasons I have before stated.

Deeply regretting the time and cost which have been expended in a fruitless litigation, I come to the conclusion which I have arrived at, after much fluctuation of opinion, and with great reluctance, that the judgment of the Court below should be reversed, and the plaintiffs be at liberty to retrace their steps, and begin *de novo*, if they shall be so advised.

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Mr. Justice *Littledale* :— In answer to the first question proposed by your Lordships, I am of opinion that the conduct of *A. B.* was a breach of the condition of the bond, for the reasons already given by my learned brothers.

The second and third questions are so much connected together, that, with the leave of the House, I should propose to give an answer which applies to both.

Two questions arise on the construction of the statute of 43 *Geo.* 3, c. 99. The first is, whether the sale of the lands and goods of the collector be a condition precedent to putting the bond in suit against the surety. The second is, whether, if it be a condition precedent, it applies to all the lands and goods of the collector, or only to those which were known to the Commissioners ; and I use the term “known,” because the word “notice,” which occurs in the pleadings, sometimes means that knowledge which is acquired by specific information given with a particular object, as in the instance of notice of dishonour of bills of exchange, and other cases ; but, as applicable to the present case, I mean by the term “known,” knowledge, in whatever way it is acquired.

Upon the first of these points, I think the sale of the lands and goods of the collector is a condition precedent to putting the bond in suit. The 13th section of the 43 *Geo.* 3, c. 99, after prescribing the form of the bond of the surety, says, that “every such bond given by way of such security as aforesaid shall be prosecuted by the Commissioners on any failure or default of the collector :” and then there immediately follows this proviso—“provided always, that no such bond shall be put in suit against any surety,

for any deficiency other than what shall remain unsatisfied after sale of the lands, tenements, goods and chattels of such collector, in pursuance and by virtue of the directions and powers given to the Commissioners by this Act." Here, therefore, is a provision that the bond shall not be put in suit for any deficiency other than what shall remain unsatisfied after a particular thing done. It is quite clear, that, if the lands and goods have been sold, the bond can only be put in suit for the difference; but if there are lands and goods, and they can be sold by the Commissioners under the powers and directions of the Act, the meaning of the clause is, that the deficiency must be ascertained first; for, otherwise, it is putting the bond in suit for the whole, where the Act says it shall only be so for a deficiency. It is a very reasonable provision for a surety, that he shall not be called upon until all has been got from the collector that can be raised.

But it is necessary to see what are the powers and directions given by the Act, by which the deficiency is to be ascertained. They are contained in the 52d section, which enacts, that if the collector makes default in the particulars enumerated, the Commissioners are authorized and empowered to imprison the person, and seize and secure the estate, both real and personal, of the collector, wheresoever the same can be discovered and found: and the Commissioners who shall so seize and secure the estate shall and they are empowered to appoint a time for a meeting of the Commissioners; and the Commissioners present at such meeting, in case the accounts of the collector be not delivered, or the money detained by him be not paid, are empowered and required to sell and dispose of all such estates which shall be for the cause aforesaid seized

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and secured. It is said that this clause as to seizing the estates is only directory to the Commissioners, as they are only authorized and empowered, and not required, to seize; and that this is more strongly shown, because in the subsequent part of the clause they are required to sell, and therefore a different phraseology is used. There is not the least doubt but that the clause as to seizing is only directory, and only gives a discretion to the Commissioners that, if the collector makes default, they may seize and secure the estates; and then, if at the subsequent meeting, the collector does not pay up his deficiency, they are required to sell. It is very reasonable that they shall not be required to sell, if the collector can redeem his estate. And then it is said, that, because the clause as to seizure is only discretionary with the Commissioners, they need not seize unless they think proper; and, as the powers and directions as to the seizure and sale of the estates are not in point of fact exercised, and need not be so unless the Commissioners think proper, the deficiency, after the exercise of these powers, is out of the question, and does not and need not arise, and the bond may be put in suit without regard to that. But I think not. The 52d section relates to the conduct to be pursued towards the collector; and the Commissioners will no doubt exercise their discretion as will best accord with the discharge of their duties to the Crown, to the parishioners, and to the collector; but if they do not think it right to enforce their powers, the sureties are not to suffer by that; the proviso in the 13th section is introduced for the benefit of the surety, and the meaning of it, in my opinion, is, that he is not to be called upon until the Commissioners have done all in their power to make the collector pay; and if for any

reason they omit to do that, they are not to call on the surety. If it be not a condition precedent, I do not see how the surety can have the benefit of the clause; for if the surety be compelled to pay the whole, I do not think he could have a mandamus to the Commissioners to seize and sell; their power is only to seize and sell if the collector has not paid the money; but if the money has been paid by other means, the collector is no longer indebted to the Commissioners: besides, if a mandamus were to go, it must be for the whole direction of the clause, and that is that the money arising from the sale shall be paid to the Receiver-general: and then the surety would have to petition the Crown to be repaid. And I should doubt whether a Court of Equity would compel a sale, unless to carry the whole clause into effect, and so as that the surety might petition the Crown when the money had got into the hands of the Receiver-general. Perhaps the Commissioners might of themselves sell, in order to relieve the surety; but, besides my doubting the power of the Commissioners to sell after they have been paid by the surety, I do not think the surety ought to be put in the situation of having to rely upon what they may be disposed to do.

It is very possible that some inconvenience, and in some cases loss, might arise if the bond could not be enforced against the surety till the property of the collector is sold; for, certainly, the proceedings under the 52d section must be attended with delay. But I do not think we have anything to do with that consideration; the question is upon the construction of the Act, as it is presented to us.

Some distinction was raised in the argument as to the meaning of the words “prosecute” and “put

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in suit;" and it was suggested, that because the words "prosecute the bond" were used without any restriction, the bond might be enforced by action immediately. But I think "prosecute" and "put in suit" are synonymous: in pleading a writ, the common phraseology is, sued and prosecuted out of the Court, &c.: and, if the word "sued" alone, or "prosecuted" alone, were used, it would mean the same thing as conjoining the two words; and in the 13th section the restriction I think must be applied as well to prosecuting the bond as putting it in suit.

The other question is as to notice or knowledge of the lands and goods; as to which there is more doubt; because there is no such language as notice or knowledge used in the Act of Parliament; but the construction of the Act of Parliament must have a reasonable intendment engrafted upon it, arising out of the existing state of things: and I think it can only be intended that the Commissioners shall be compellable to seize and sell for the benefit of the surety such lands and goods as they know of: it is impossible for them to seize things of which they are ignorant; and it would not be any breach of duty in them not to seize lands of which they had no knowledge. If they were negligent in not taking reasonable means, according to circumstances, to find out the effects, it might furnish some means of proceeding against the Commissioners; but, as a mere question of construction, whether they were bound as a condition precedent to seize that of which they had no knowledge, any acts of negligence or want of attention in that respect could not arise. I do not think the words "wheresoever the same can be discovered and found," apply to this part of the construction; and I think that means, wherever locally they

can be found. The collector might have some small interest in public works and undertakings where there are a great number of proprietors, as to which the Commissioners would have no means of obtaining information. So, also, an estate may have come to him as heir-at-law or devisee of a person who died the day before the bond was put in suit, of which the Commissioners knew nothing; or, he might have a small quantity of goods in some obscure room; and many other cases might be put where knowledge of the fact of his having lands or goods would be utterly impossible; and then, if knowledge were not made an accompaniment of the property, a very small amount of effects, under circumstances before stated, would prevent the bond being sued upon. I do not think that the question of hardship ought to influence my opinion either on one side or the other, but it may be observed that this construction does not seem to impose any great degree of hardship on the surety; because, if he looked after his own interests, a very little exertion would enable him to make himself acquainted at least with the material parts of the property of the collector; and if he were afraid that the Commissioners may not be very anxious to get the information themselves, it would be very easy for the surety to give distinct notice of the property to the Commissioners—not that I mean, as I have before stated, that express notice need be given, for, if they have knowledge by any means whatever, that constitutes notice within the meaning of the word “notice” as used in these proceedings.

The result of these remarks on the second and third questions is, that, under the circumstances stated in the second question, there would be a good defence to the action; and that, under the circumstances stated

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in the third question, there would not be a good defence to the action.

As to the fourth question,—the replication to the fifth plea states that *Bigg* had no lands within the jurisdiction of the Commissioners which they could seize and sell of which they had notice, and that all the goods and chattels of *Bigg*, within the jurisdiction of the Commissioners, and of which the plaintiffs had notice, were seized and sold. The rejoinder to this replication says that *Bigg* had divers lands within the jurisdiction of the Commissioners which they could and might have seized and sold, and that all the goods and chattels of *Bigg*, which could and might and ought to have been discovered and found by the Commissioners, were not seized and sold in pursuance of the directions and powers given to the Commissioners by the said Act of Parliament, in manner and form as the plaintiffs had above in that behalf alleged, and of this the defendant puts himself upon the country. And the finding of the jury on the issue so tendered is—“And as to the issue twelfthly above joined, the jurors say that *Bigg* had lands or houses to him belonging of the value of 121 *l.*, which could and might have been seized and sold by the Commissioners in pursuance and by virtue of the directions and powers given to the Commissioners by the said Act of Parliament; and that *Bigg* had also goods and chattels to him belonging, of the value of 200 *l.*, which also they could and might have seized and sold in like manner, under and by virtue of the provisions of the said Act.” Now, in this part of the finding, the issue raised in the rejoinder is found for the defendant. It is very true that the jury also find that the Commissioners had not notice of *Bigg* being possessed of the houses or lands; but they find that

they had reasonable grounds for believing that *Bigg* possessed the said household goods, which might have been seized and sold by them under and by virtue of the provisions of the said Act of Parliament, and that *Bigg* absconded: but the other facts found on the special verdict as to this, are not put in issue by the rejoinder to the replication to the fifth plea. And the findings as to that do not vary the finding of the issue on the facts alleged. And therefore, in answer to the fourth question, I think the verdict must be entered for the defendant.

To the fifth question,—I think the plaintiffs are not entitled to judgment *non obstante veredicto*. The fifth plea states that *Bigg* had lands and goods of which the Commissioners had notice, and which were subject and liable to be seized and sold, and which might have been seized and sold, but which remained unsold by the Commissioners. This plea, in my opinion, is a good answer to the action, unless it be impeached, and the effect of it taken away, by the subsequent pleadings: it confesses the bond, and avoids the effect of it. The replication to this plea says that *Bigg* had no lands which the Commissioners could seize and sell, of which they had notice; and that all the goods of *Bigg* of which the Commissioners had notice were seized and sold. The rejoinder says, that *Bigg* had lands which the Commissioners might have seized and sold, and that all the goods of *Bigg* which could and might and ought to have been discovered and found by the Commissioners, were not seized and sold in pursuance of the directions and powers given to the Commissioners by the said Act of Parliament, in manner and form as the plaintiffs have alleged.

Now, the plea being good, and the replication

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being also a good answer, a material point in dispute is tending towards an issue. But when the defendant comes to rejoin, he drops all about the notice. Now, as notice is a material point, the rejoinder is bad, because it omits to put in issue a material point; and the rejoinder might have been demurred to: but the plaintiffs have not demurred, but they have joined issue upon a fact which, taken simply of itself, is not sufficient to decide the merits of the case, and may be treated, not as altogether immaterial, because it is material whether *Bigg* had lands; but, though material in part, it is not material to decide the case, but is rather to be treated as insufficient.

The cause is tried upon the issue so tendered and joined; and the verdict, if it is to be confined to the very words of the issue, is found for the defendant. But, as the plea itself is a good plea, I do not think the subsequent defects in the pleadings are to invalidate the plea to such an extent as to say that the plaintiff is entitled to a verdict *non obstante veredicto*. The cases where the plaintiff is entitled to such a benefit, are, where the plea to the action is insufficient: here the plea is sufficient; but the plaintiffs have not taken care to put the plea (if one may so express it) out of doors. If the rejoinder could be taken to be a confession of the want of notice, it might be contended that the judgment ought to be entered for the plaintiffs; because, if the defendant has admitted want of notice, then the finding of the jury that *Bigg* had lands, when coupled with the confession of the defendant that there was no notice, would show that he had no defence. But I do not think that the defendant can be taken to have confessed that the Commissioners had no notice; for the allegation that *Bigg* had lands of which the Commis-

sioners had notice, is one entire allegation ; and the notice is not alleged as a substantive thing ; and I do not think that the dropping part of an allegation, when the other part by that means becomes immaterial, is to be an admission of what is so dropped.

To the sixth question,—I think a Court of Error cannot award a repleader, for the reasons given by my learned brothers. If it could be awarded, it should be so in this case.

As to the seventh question,—I see nothing to entitle the plaintiffs to judgment on the whole record. Whatever may be the case as to the other pleadings, I think that as to the seventh question, we are confined to the questions arising out of the fifth plea. As I think that the fifth plea constitutes a good defence, and as the plaintiffs have not taken care to get rid of it, but have gone to trial on an immaterial issue, though the verdict must be entered for the defendant, yet no judgment can be entered for him : and as, for the reasons I have before given, I think the plaintiff is not entitled to judgment *non obstante veredicto*, I think that the judgment given in the Court below must be reversed.

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Lord *Brougham* :—This was an action brought on a bond, in which the present Plaintiff in Error, the defendant below, was surety for a person of the name of *Bigg*, who was appointed, under the 43 *Geo.* 3, c. 99, and other Acts which that Act consolidated and amended, collector of assessed taxes for the parish of *St. Matthew, Bethnal-green*. The action was brought for the recovery of the sum of 693 *l.*, which was alleged to be due to the Receiver-general of the county of *Middlesex*, in consequence of *Bigg*

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not having paid in that sum to the account of the year 1828-9, for which the Plaintiff in Error had become surety, and for which it was received and collected by *Bigg*, but to the account of the year immediately preceding, for which year the Plaintiff in Error was not surety. Many questions arose, both in the Court below, and afterwards in the Court of Exchequer Chamber, which are at last brought by appeal before your Lordships, upon the liability of that surety, and upon the pleadings in the cause. The question on the latter did not arise in the Court of Common Pleas, but in the first Court of Error into which the case was brought, viz. the Court of Exchequer Chamber. To the action upon the bond various pleas were pleaded, and various issues raised upon the pleadings, to which it is now unnecessary that I should call your Lordships' attention. But much that I have now to offer will depend upon the pleadings, and therefore to the state of the pleadings it will be my duty in a little time to direct your Lordships' attention. Suffice it at present to say, that the issues being joined, were tried before Mr. Baron *Alderson*, when questions were put to the jury, to the number of seven; to which questions they returned answers; and upon them, by consent, a general verdict was entered for the Plaintiff in Error, with leave to move the Court of Common Pleas, in which the action was brought, to set aside that verdict and enter a verdict for the penalty of the bond; and that Court being moved, it was agreed that a special case should be taken, to be turned, if necessary, into a special verdict, with a view to carry the question elsewhere, should one or the other of the parties not be satisfied with the judgment of that Court. The point was first argued before that Court on the special case,

which was afterwards turned into a special verdict. The Court of Common Pleas, on the argument of that case, pronounced judgment for the then plaintiffs, the Commissioners of assessed taxes in that parish, the present Defendants in Error, for the sum of 693 l., which, as I have already stated, is that respecting which the question had arisen. Upon that, a writ of Error was brought in the Court of Exchequer Chamber; and that Court, after very great difference of opinion, finally affirmed the judgment of the Court of Common Pleas. The writ of error, which brings it before your Lordships, was then sued out by the party who was defendant in the original proceeding, but who now became the Plaintiff in Error, against the judgment of the Court of Exchequer Chamber, which had affirmed the judgment of the Court of Common Pleas; and your Lordships, on hearing this case argued (which it was at great length, and with great learning and ability), had the assistance of nine of the learned Judges, including several of those Judges who had attended the discussion in the Exchequer Chamber; but, I think, none of those learned Judges who had originally pronounced the judgment in the Court of Common Pleas. Those learned Judges who attended the arguments here, differed very materially on some points; on others they almost all concurred: to the exceptions I shall presently call the attention of your Lordships. The result is, that it remains for your Lordships to pronounce judgment; and I certainly feel, in the circumstances I have stated, very considerable anxiety in recommending the judgment about to be submitted to your Lordships, though I think your Lordships will perceive, when I have gone through the circumstances of this somewhat singular case, which it will be my duty to do rather

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fully, that there will be no doubt what course your Lordships ought to take.

There were several points made in the Court below, which have not been so far relied on here as to require the consideration of your Lordships; and accordingly on these you put no questions to the learned Judges. These related chiefly to the issues on the 8th and 11th pleas; and the question raised on them was, whether the provisions of the Act regarding the previous examination of the collector by the Commissioners, and the hastening his payment of the monies collected to the Receiver-general, were imperative, so as to constitute those proceedings by the Commissioners conditions precedent to their proceeding against the surety, or were only directory. That they were only directory, all the Judges below, both in the Common Pleas and Exchequer Chamber, appear to have agreed; nor can there be any further doubt upon the point. We therefore come to the questions which properly now remain for consideration. The first which presents itself needs not to detain us long, but it must be disposed of before the others, which are mainly in dispute, can arise. Was the payment by the collector of 693*l.* (the sum for which the plaintiff has recovered) to the Receiver-general, not to the account of the year 1828–9, for the service of which year it had come to his hands, but to the account of a former year, during which the defendant was not security, a breach of the condition in the bond? It appears to me very clear that such payment was not well and truly paying according to the true intent and meaning of the Acts. The Acts intend and mean that the money of each year should be carried to the account of that year. But the payments made in this case were made in discharge of

a debt due for a former year. The appointment of collector is annual ; and I really can see no difference in the construction that ought to be put upon the statute here, and that which ought to be put on it in a case where a different person had been collector in the former year. Had it been so, and had the money been paid to the account of that person's debt, no doubt whatever could have been raised. Here it is paying another debt of the collector himself ; and though the public are the creditors in both cases, yet it is the payment of another debt as much as if it had been owing to another creditor. Accordingly, we find all the learned Judges are agreed in their opinions upon this point. On this point, too, the Judges of the Common Pleas were unanimous.

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The next question is one upon which the Court of Common Pleas gave no opinion, and on which all the other Judges, with one exception, are agreed ; both those whose assistance we had here, and those who dealt with it in the Exchequer Chamber. That question is, whether the seizure and sale of the collector's lands and goods by the Commissioners constituted a condition precedent to their putting the bond in suit against his surety ? The words of the 13th section of the Act appear to leave no reasonable doubt on this subject. After pointing out the manner of giving security, the section proceeds to enact, " that no such bond shall be put in suit against any surety or sureties for any deficiency other than what shall remain unsatisfied after the sale of the lands and goods of such collector, in pursuance of the directions and powers given to the respective Commissioners by this Act." Now, as this taken by itself could leave no doubt that the bond was only to be sued upon for the balance left unpaid after the collector's lands and

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goods had been seized and sold, and as the only ground upon which a question can be raised, is the reference made to the powers given by the Act, which are specified in the 52d section, it becomes material to consider that section. It empowers and authorizes (but does not require) the imprisonment of the collector's person, and the seizure of his estate, real and personal, "wheresoever the same can be discovered and found;" and then it authorizes and requires the sale of the property which may have been seized, if the collector shall not have paid before the next meeting: from which it is contended that as the Commissioners have a discretion given them to seize, and are duly required to sell what they have seized, they must sell, and are forbidden by the proviso in the 13th section to sue the surety for more than the balance left unsatisfied by the seizure and sale, in case they shall have elected to seize and sell under the 52d section. But the reason why the seizure is discretionary, and the sale alone imperative, is to give the collector the opportunity of redeeming after the seizure. The 52d section relates to the proceedings against the collector; the 13th to those against the surety, and the proviso in the latter appears expressly framed for the benefit of the surety. Whoever gives bond for the collector, must, on reading the 13th section, suppose that he only becomes bound for what remains unsatisfied after the seizure and sale of the collector's property. To hold that the discretion given by the 52d section of proceeding against the collector, imports into the 13th a condition "in case the Commissioners shall choose to seize," would be altering the nature of the proviso, rendering it unavailing to the surety, and placing him in the same situation in which the collector himself is under the

statute of *Will. 3*, and in which the surety would have been had no proviso been introduced into this Act in his favour; although it is plainly the intention of the proviso to place him in a better situation than the collector. The argument used that the power given by the 52d section may be exercised in the surety's favour after he shall have been compelled to pay the debt, and that a mandamus will lie to compel the Commissioners to seize and sell, does not appear to have any good foundation. The power given by that section is to seize and sell for the collector's debt. The power given is to seize on his default, and sell for what he has left unpaid. If the payment by the surety is his payment, there is no power to seize and sell, for there is no debt. If the payment by the surety is not his payment, then there may be a debt, and there may be a power to seize, but there is more, there is an obligation to pay over; just as if the debt subsisted; for the words require a payment into the hands of the Receiver-general of such sums as have not been accounted for by the collector; so that if the Commissioners are compellable to seize and sell because the surety has paid, they are compellable to pay the whole debt into the Receiver-general's hands, although the surety shall have previously paid it, and then the surety must look to the Receiver for being reimbursed, without there being any words whatever in the statute giving him such resource for the recovery of what is due to him: a proposition which seems wholly untenable. It therefore appears sufficiently plain that the bond cannot be put in suit against the surety, unless and until the Commissioners have exercised the power given them against the principal. Although, where a statutory enactment is clear, there is no occasion to argue from the consequences of a

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construction, and where it is ambiguous, such an argument is only admissible if it is connected with the general intention of the Act, yet we cannot avoid perceiving here, that unless the Commissioners are obliged to seize the collector's goods before suing the surety, they may, and very likely will, proceed against a solvent surety, rather than incur the trouble of seizing and selling; so that the whole benefit plainly intended for the surety will be lost to him.

The next question has given rise to a much greater diversity of opinion: it is, whether the Commissioners are bound, before proceeding against the surety, to seize all the collector's lands and goods, or only those of which they have notice; meaning by notice, as it is now on all hands agreed, knowledge, however acquired. The proviso in the 13th section is clear and express that the bond shall not be put in suit for any deficiency other than what shall remain unsatisfied after the sale of the lands and goods of the collector, in pursuance of the directions and powers of the Act; that is, of those given by the 52d section. This sale being by what has been already shown a condition precedent, the 13th section must be read as if it provided that the surety shall not be sued until after the lands and goods of the principal shall have been sold under the powers of the 52d section, which authorizes the seizure and sale of the whole estate wherever it can be discovered and found. The two sections taken together thus make no exception, but render the sale of all the principal's estate a condition precedent to proceedings against the surety. Have we any right to graft upon this plain and positive enactment a qualification restricting the performance of the condition to the seizure and sale of such estate only as shall have come to the knowledge of

the Commissioners? The only words that can be supposed to import any restriction whatever are these: "wheresoever the same can be discovered or found." But these words only refer to the local situation of the property, and are meant to give a power over the whole, wheresoever situated. They are enabling words, words of enlargement rather than restriction. They import that whatever property can anywhere be found, may be seized. If they are read as they must be to support the argument raised upon them, they must be read thus: "whenever the property shall be discovered or become known to," or rather, "if any such property shall be discovered or become known to" them. But how could they seize any which had not become known to them? This is plainly an insensible construction, and the words can only refer to the situation. They mean all property wheresoever found. It is not to be denied that the condition of notice may sometimes be implied where the conditions of an enactment do not specify it: but this cannot be in cases where the party has no exclusive means of knowledge, nor any duty to inquire. The surety may know more about the affairs of the collector than the Commissioners, but not necessarily so; nor is there any duty cast upon him more than upon them, to become acquainted with the collector's property. The consequences of a construction which does not hold notice to be necessary, form confessedly the only ground for maintaining the affirmative of the proposition. It is said, and truly said, that if the Commissioners cannot proceed against the surety until all the property of the collector is seized, they may not be safe in proceeding while any unknown parcel of goods exists, or in case any estate, real or personal, has on the eve of the seizure come to

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the collector by descent, devise or bequest; but nothing can be more dangerous than to make such considerations the ground of construing an enactment quite complete and unambiguous in itself. If we depart from the plain and obvious meaning on account of such views, we in truth do not construe the Act but alter it. We add words to it, or vary the words in which its provisions are couched. We supply a defect which the Legislature could easily have supplied, and are making the law, not interpreting it. This becomes peculiarly improper in dealing with a modern statute, because the extreme conciseness of the ancient statutes was the only ground for the sort of legislative interpretation frequently put upon their words by the Judges. The prolixity of modern statutes, so very remarkable of late, affords no ground to justify such a sort of interpretation. The only safe rule to go by is to hold that, if the Legislature had intended to obviate the consequences apprehended, it would have done so: nothing confessedly being more easy than to have added words confining the condition precedent to the property of which the Commissioners had notice. In considering this point no authorities are to be found, except so far as the dicta of Lord *Tenterden* and Mr. Justice *Holroyd*, in *Peppin v. Cook* (*n*), certainly favour the literal construction rather than the other: but then no case has been cited, and none can be shown, where, in construing a recent statute requiring all the things of a certain description to be dealt with or by in a particular way, the Courts have held themselves bound to add the words, "and whereof *A.* had notice or knowledge." Nothing could justify this but the impossibility of

(*n*) 2 Barn. & Ald. 431.

otherwise making sense of the provision. Now here it is not contended that the general meaning of the enactment makes the addition necessary; the statute is very sensible without it. Neither is it necessary for enabling the Commissioners to act; they may ascertain the property of the collector at the time of appointing him and accepting his security. They may even inform themselves from time to time of any change in that property: but if they should be unable to do so, and inconvenience should thence arise, still there is no ground for adding to the statutory enactment, because the Legislature might easily have provided against it. But supposing that we are agreed that the seizure and sale constitute a condition precedent, and that the want of notice is immaterial; in other words that the surety has a good defence to the action, on the ground that the plaintiffs, the Commissioners, had not seized and sold the collector's property: although it would then follow that the judgment cannot be reversed because it cannot be given for the plaintiffs, it still does not follow that it must be entered for the defendant, or that in the state of this record it can be so entered. We must now, therefore, examine the pleadings with a view to find whether there be any issue joined between the parties, upon which judgment can be given. For this purpose the fifth plea, and the issue on the replication to that and the rejoinder, need alone be considered, because the sixth being similar to the eighth, and the seventh and twelfth referring themselves to the fifth and sixth, the whole question on the pleadings resolves itself into the question arising on the fifth plea, and the whole four issues, 9, 12, 13, and 16, raise only the same question, namely, that which arises out of the pleading upon the fifth plea. The fifth plea is, that

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“ the collector, before action brought, and continually hitherto, had lands and goods within the jurisdiction of the Commissioners of which they had notice, and which might have been seized and sold under the Act to satisfy the debt of the collector ; but that the same have not been so sold by them.” In substance the plea is, that the collector had property of which the Commissioners had notice ; and that they did not seize and sell it. The replication is, that after the default the collector had, within the jurisdiction of the Commissioners, no lands of which they had notice, and no goods of which they had notice, other than a certain parcel known to them, and which they had seized and sold : in substance, that the collector had no property subject to seizure and sale, of which the Commissioners had notice. The rejoinder is, that after the default the collector had lands which the Commissioners might have seized and sold ; and that after the default, all the goods of the collector at the time of the default, and which might and ought to have been discovered and found by the Commissioners within their jurisdiction, were not seized and sold by them in pursuance of the powers under the Act, in manner and form as alleged by the plaintiffs : and it concludes to the country. In substance it is, that the collector had lands which might have been sold, and that his goods which might have been sold were not sold : and this rejoinder says nothing whatever of notice, the want of which had been stated in the plea and taken up by the replication : the *modo et forma* clearly referring not to the substantive matters of the plaintiffs’ allegation, namely, “ goods of which the Commissioners had notice,” but only to the manner in which the plaintiffs had made the allegation.

Then the verdict is, that the collector had lands

and goods after the default and until the commencement of the suit, which lands and goods might have been seized and sold by the Commissioners under the Act before the commencement of the suit; but that the Commissioners had no notice of the collector's lands, but had reasonable grounds for believing that he had goods:—and this does not amount to a finding that they believed he had any. It has been treated as a finding that they had no notice of either lands or goods: I am rather disposed to regard it as negating notice of the lands, and as no finding at all on notice of the goods. But this becomes immaterial if the notice is immaterial; and therefore let it be taken, as it has been taken, to be a finding that they had notice of neither lands nor goods.

We have now to consider what the issue is upon which the verdict is found, and whether there is really any issue at all. The plea affirms the existence, not of lands and goods absolutely, but of lands and goods of which the Commissioners had notice, and which they might have seized and sold. The replication asserts that there were no seizable or saleable lands and goods of which the Commissioners had notice. The rejoinder, without mentioning notice at all, asserts that there were saleable and seizable lands, and that goods seizable and saleable were not seized and sold: which, though very inartificially expressed, may be taken after the verdict to assert (what it does not assert, except inferentially) that the collector had goods as well as lands seizable and saleable. Now it is plain that here the parties make their averments of and concerning different things, and not of the same thing: the one pleads respecting property in one predicament, and the other respecting property not in the same, but in another predicament. The allegations

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of the two parties, far from being diametrically opposed to one another, as they must be to raise an issue, are not at all inconsistent with each other. If I say that all the freehold lands of *J. S.* in the manor of *A.* have been sold, and my adversary only says that all the lands of *J. S.* in the manor of *A.* have not been sold, he does not negative my assertion. My proposition contained a negative pregnant (indeed the replication would on this ground have been demurrable specially). I might have explained or particularized the proposition thus: "All the freeholds have been sold, but all the copyholds remained unsold." And my adversary might have explained or particularized his proposition in the very same words: so that, instead of one having asserted an affirmative, and the other a negative, respecting the same matter, which is the character of every issue, both of us would only have been asserting propositions which, far from being opposite, are quite consistent, and might have been identical. The more this pleading is examined, the more plainly will it appear that it raises no issue at all: neither an informal one, which would be cured by the statute after verdict; nor an immaterial one, which could not be so cured: consequently the verdict is a nullity, according to all the authorities. *Sandback v. Turvey* (*o*), and other cases, lay this clearly down: and although cases are cited which seem to throw some doubt upon the position, it is to be observed that those are rather cases where there was an issue raised, though an informal issue, than where there was none whatever. One of them, too, *Parker v. Taylor* (*p*), is said in another case, *Walsingham v. Coombe* (*q*), to have been denied: and another

(*o*) Cro. Jac. 585.

(*p*) Cro. Car. 316.

(*q*) Siderfin, 289; 1 Lev. 183;
 2 Keb. 10-13-47-51.

of them, *Walthall v. Aldrich* (r), was decided the very term after *Sandback v. Turvey*, viz. *Michaelmas*, 17 Jac. 1, and without any reference to the former case: which plainly shows that the two decisions were not regarded as inconsistent. Nothing indeed could be more contrary to all principle, nay to common sense, than to regard a finding upon an issue which had no existence, as other than a nullity. The jury must be taken to have found a verdict upon a matter not before them, as much as if they had given a verdict in another cause. The learned Judges have all agreed that the verdict on the fifth plea must be entered for the defendant, but no one of them holds that the judgment can be entered generally for the defendant. Upon different reasons they all arrive at this conclusion; as well those who hold the seizure and sale of all property a condition precedent, as those who hold only a seizure and sale of the property known to the Commissioners a condition precedent: and much more the learned Judge who alone considers the seizure and sale no condition precedent at all, whether with or without notice. I ought to state that one of the learned Judges whose assistance your Lordships had (Mr. Baron *Parke*), and he alone, took that view of the case, that a seizure and sale did not constitute a condition precedent, with or without notice: he was the only Judge here who held that proposition; but one Judge in the Court of Exchequer Chamber concurred with him in that opinion, namely, Lord *Abinger*. All the other Judges in the Court of Exchequer Chamber, as well as here, took a different view. The whole of the learned Judges, therefore, whose opinions have been given in answer to the questions put, are

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(r) Cro. Jac. 583; Godol. 107.

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agreed that there can, in no view, be judgment for the defendant upon the issues which these pleadings raise; but that if judgment be not entered for the plaintiffs, there must be a simple reversal, and they must begin again, should they be so advised. A repleader would have been awarded in the Common Pleas, had the points on the pleading been made there; but it is agreed on all hands that a Court of Error cannot award a repleader. The only grounds upon which judgment could be given for the plaintiffs are two: either that it may be given now *non obstante veredicto*, on an implied confession in the rejoinder; or that, upon matter disclosed in other parts of the record, it may be given disregarding the immaterial issue. But all the Judges hold that judgment *non obstante veredicto* cannot be given on an implied confession in the rejoinder: that if there were lands and goods, the Commissioners had no notice of them: and surely the mere dropping of all mention of notice—the merely not re-asserting in the rejoinder the notice which had been asserted in the plea—cannot be taken as a confession of want of notice, entitling the plaintiffs to judgment. The case on this point stands thus: The plea is good, even if notice be supposed necessary. The replication meets the plea on this ground, and therefore answers it sufficiently. The rejoinder dropping the mention of notice is bad, on the supposition that notice is necessary, and might on that ground be demurred to; but they have not demurred. But then it contains no confession. The mere leaving out of notice, the not averring notice, does not confess it. The averment in the replication was not substantive that the Commissioners had notice, but the notice was part of one entire allegation; and the omitting a part which was essential to its materiality, and so leaving

what was least immaterial, cannot be taken as a confession of the thing omitted. Therefore, even supposing notice to be material and necessary, the plaintiffs could not have judgment on this ground. Even supposing notice necessary, the plaintiffs cannot have judgment on the whole record, if, as all but one of the learned Judges held, the fact of seizure and sale be a condition precedent. Now all are agreed on that point, with the exception of another learned Judge, who, agreeing that the seizure and sale form a condition precedent, yet holds that enough appears on the whole record to entitle the plaintiffs to judgment. For this opinion there is confessedly no direct authority: but what the Court of Common Pleas said in *Goodburn v. Bowman* (s) is relied on, to show that though you cannot have recourse to one plea not expressly referred to, in considering the sufficiency or insufficiency of any other plea, yet that all the pleas may be taken into consideration on a notice to enter judgment on the whole record. But it does not appear necessary to that case that this should have been held; it was therefore extrajudicial in that case; and even if it had not been so, there is this difference between the two cases: that there the pleas held bad were those out of which the immaterial issues arose; while here a good plea remains in bar of the action, after passing over the immaterial issue, or treating it as a nullity. The judgment of reversal which may now be given, will therefore substantially agree with the opinions of all but one of the learned Judges, upon the assumption upon which all but another of the learned Judges are agreed, that seizure and sale constitute a condition precedent. The consequence will

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(s) 9 Bing. 52; 2 Moo. & Sc. 713.

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be that the plaintiffs may begin *de novo*. But if I am right in agreeing with those of the learned Judges who hold want of notice to be immaterial, the most carefully conducted pleadings in another suit never can avail the plaintiffs, or entitle them ultimately to a judgment.

Of the questions to which I have directed the attention of your Lordships, it is to be observed that the first three are those upon which the merits of the defence were decided in the Court of Common Pleas: those arising upon the pleadings do not appear to have been there made, and accordingly we have no judgment upon them except that in the Exchequer Chamber, where one only of the three learned Judges who have not attended your Lordships has given any opinion on those points. Even of the questions upon the merits, the first appears to have been argued more fully than the other two. A great part of the judgment in the Court below is upon the points which have never been made, or at least at all relied on here, and a very small portion of it relates to that which has been the subject of discussion before your Lordships. Under these circumstances, my Lords, I have no hesitation in moving, simply to reverse the judgment of the Exchequer Chamber; which will have the effect of affirming the judgment of the Court of Common Pleas.

The *Lord Chancellor* :—My Lords, notwithstanding the complexity of this case, and the difference of opinion amongst the Judges upon some points, it does not appear to me that there is much difficulty in deciding upon the course this House ought to adopt, because there are points upon which there is a uniformity of opinion amongst the Judges, in which I think it is

impossible not to concur, as to such part of the case as must regulate that course, if your Lordships agree in opinion with the learned Judges upon those points. That the condition of the bond was broken, there is, I conceive, no doubt. In this all the Judges concur; and all but one concur in thinking that the appropriation of the property of the collector, towards payment of the debt due from him, was a condition precedent to calling on the surety: whether it was to exhaust the whole of his property, or such part alone as came to the knowledge of the Commissioners, was the subject of much difference of opinion amongst the Judges; but as the defendant, by his fifth plea, set up the defence that property of the collector of which the Commissioners had notice had not been applied, and as the decision must turn upon that plea, it does not appear to me to be very material to consider how far the defendant might have defended himself by pleading and proving that the collector had property unapplied, of which it was not shown that the Commissioners had notice.

According to the opinion of all the Judges but one, the fifth plea, if established by a verdict, would have amounted to a good defence to the action. Objections were made as to the manner in which the plaintiffs' replication to the fifth plea was framed; but in substance the replication tendered an issue on the defence set up in the fifth plea, which alleged that the collector had property, of which the Commissioners had notice. The defendant did not join issue on the point so raised, but by his rejoinder departed from his plea; and the plaintiffs, instead of taking advantage of that departure in the proper manner by demurrer, took issue on this irregular rejoinder. And the question is, what, under such circumstances, ought to be the fate

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of the action. The issue so raised being, if it is to be considered an issue at all, an immaterial issue, cannot, though found for the defendant, afford ground of a judgment for him in the action. At the same time, the state of the pleadings precludes the plaintiffs having a judgment *non obstante veredicto* ; for, so far from there being any admission upon the record of their title, there is the fifth plea, which, if true, would constitute a good defence to it. This unfortunate state of the pleadings could not have arisen without blunders on both sides. That there can be no repleader in this House appears clear from the opinion of all the Judges, and the authorities to which they refer ; and as there can be neither judgment for the plaintiffs nor for the defendant, the only course is to reverse, simpliciter, the judgment of the Court below.

Lord *Brougham* :—The defendant cannot get his costs, though he has succeeded here : but upon the whole, everything connected with the rejoinder being considered, I cannot say that that in my opinion is to be regretted.

Judgment reversed.

DUNCAN STEWART - - - - - *Appellant.*

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Jan. 23, 25, 26.

WILLIAM GIBSON, and JOHN MACKENZIE, his Mandatory - - - - - } *Respondents.*

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(*Et e Contra.*)

AN *American* ship was fitted out in the port of *Liverpool* and sent to the coast of *Africa*, in 1806, on a joint adventure for trafficking in slaves. An *English* ship was sent at the same time, by the same parties, with arms and ammunition, to be at the disposal of the supercargo of the *American* ship; security having been given to the Admiralty that they were to be expended in trade on the coast of *Africa*. On the arrival of the two ships in the river *Congo*, the arms and ammunition were transhipped on board the *American* ship, which was thereupon seized by a British privateer, and ultimately condemned as contraband.—HELD that the whole transaction was illegal, and that no action for contribution or account, in regard thereto, could be maintained by any of the parties concerned, against the others.

Illegal Contract; no Right of Action. Practice. Parties.

Semle, that in the Courts of *Scotland*, as in *England*, one partner of a dissolved company has no title to sue in his own name another partner or a stranger to the company, in respect of advances made by the company or other person.

THE summons in the action, out of which these appeals arose, narrated, among other things, that in the year 1806, *James Broadfoot*, merchant in *Charleston, South Carolina*, in the United States of *America*, made a purchase of the *American* ship *Washington* (which had shortly before arrived in that port with a cargo of slaves from the river *Congo* in *Africa*), in contemplation of fitting her out on another voyage to the coast of *Africa*, for the purpose of trafficking in slaves: That in order to procure the necessary cargo, and to obtain the requisite assistance in money and credit for such an adventure, he consigned the said ship to the port of *Liverpool*, to the address of

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William Gibson and *William Broadfoot*, under the title or firm of *William Gibson & Company*; and, as he had not the means of furnishing them with funds to fit her out on his own account solely, he gave special directions to *Gibson*, the acting partner of said concern (to whom he at the same time forwarded a full power of attorney), either to sell the ship, or to fit her out for the proposed voyage, and interest such persons in the adventure as he should think advisable: That the said ship having arrived at *Liverpool* in *March* 1806, *Gibson* determined on fitting her out on the proposed voyage, agreeably to the instructions he had received; and, in order to lighten the responsibility, to divide the adventure in shares amongst several persons, who were to hold specific interests in both ship and cargo: That by letter dated the 27th of *May* 1806, addressed by *Gibson* to *Duncan Stewart*, then residing in *Liverpool* (now surgeon in *Bo'ness*, in the county of *Linlithgow*), he proposed that the said *Stewart* should hold a secret interest or share to the extent of one-eighth part of the ship and cargo, and be entitled to the profit, or liable to the loss, as the case might happen, agreeably to that proportion: That by letter, dated the same day, addressed in reply to *Gibson*, *Stewart* agreed to accept such share or interest in the ship and cargo, and to be entitled to the profit, or suffer the loss, &c.: That in prosecution of the said voyage, the *Washington* sailed from *Liverpool* in *June* 1806, under the sole direction and management of *Stewart*, who was appointed supercargo, with powers to act in the name and for the benefit of the other owners: That some days after her arrival in the river *Congo*, in the month of *August* 1806, she was boarded and taken possession of by the crew of a *British* armed cutter privateer, and after-

wards sent, by orders of the commander, to *Surinam*, for adjudication; and was, by decree of the Court of the Vice-Admiralty of *Barbadoes*, liberated and restored to the owners, but was finally condemned in the Court of Appeals: That the said *Stewart*, in consequence of said adventure, is indebted to the said *Gibson* in the following sums of money, viz.: 1,272 *l.* 8 *s.* 7 *d.*, being the balance arising upon his eighth share of the ship and cargo, conform to an account-current thereof, made up to the 31st of *December* 1810; as also 1,132 *l.* 9 *s.* 4 *d.*, being money received by him in the island of *Barbados* from the agents of the pursuer, and applied by him to his own purposes; and also 139 *l.* 16 *s.* 3 *d.* conform to state of accounts.

The summons concluded for payment by *Stewart* of the said three sums of money, with interest respectively, and expenses of suit, to *Gibson* or his mandatory; still reserving to the pursuer all claims for damages arising from the alleged misconduct of *Stewart*, on any demands the pursuer might have against him as a copartner, corresponding to his share in the adventure.

Against that action the following defences were set up, among others less material:—1. That the narrative of the libel contradicted its conclusions; for it said that the ship *Washington* was consigned to the address of “*William Gibson & Company*,” and that the owner gave special directions and forwarded a power of attorney to *Gibson*, the acting partner of said concern, to fit out the vessel for the voyage, and to interest third parties in the adventure. Whatever, then, the pursuer did in prosecution of these directions and powers, he must have done, not for his own behoof, but on behalf of *William Gibson & Company*. With

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William Gibson & Company, or with their constituent, *James Broadfoot*, the third parties who took an interest in the adventure must have contracted, and must have become their partners, and not partners of the pursuer, in the adventure. Consequently, even looking no further than the pursuer's summons, the narrative of that libel did not entitle him to claim individually the sums pursued for. And, in point of fact, the defender having never transacted or contracted with the pursuer as an individual with relation to the said adventure, was not and could not be indebted to him individually "in consequence of said adventure."

2. That it was adjudged in a former action, recently determined, that the pursuer was not entitled to prosecute any alleged claims due to *William Gibson & Company*; and, in particular, that he was not entitled to sue for the special sums now concluded for: That former action and diligence were raised by the present pursuer in 1811, designing himself "*William Gibson*, merchant in *Liverpool*, for himself, and as attorney for and copartner in trade of *William Broadfoot*, merchant in *Charleston*, carrying on trade in *Liverpool* under the firm of *William Gibson & Company*, and *Thomas Moffat*, writer in *Edinburgh*, the mandatory of the said *William Gibson*;" and they proceeded upon the same grounds, and for the same sums, now again concluded for. In that action also the defender objected to the pursuer's title to pursue in his own name for any sum said to be due to "*William Gibson & Company*;" and the Lord Ordinary sustained that defence, and dismissed the action, with costs; and to that interlocutor the Second Division of the Court of Session adhered.

3. That (as to the merits) if any loss arose upon the joint adventure, for payment of the defender's alleged

share of which the first branch of the libel concluded, it was occasioned solely by the illegal act or culpable negligence of the pursuer and his partner, under the firm of *W. Gibson & Co.*, or one of them, in shipping on board the vessel, upon her outward voyage, guns and gunpowder to a prohibited extent (a) and in violation of her neutrality as a foreign ship, whereby ship and cargo were exposed to seizure, and were ultimately condemned as lawful prizes to a *British* privateer, and the insurances effected upon them were invalidated and the joint adventurers deprived of all recovery of loss (b); and on this ground, the defender claimed to be entitled to indemnity from the pursuer and his partner under the said firm.

4. That the second branch of the libel, which concluded for payment of 1,132 *l.* 9 *s.* 4 *d.*, alleged to have been received by the defender in *Barbadoes* from the agents of the pursuer, was untrue, and contradicted by the conclusions of the former action, in which the pursuer insisted, in name of *W. Gibson & Co.*, on payment by the defender of this identical sum, as having been received by him from the agents of the said *W. Gibson & Co.*

5. That the sum of 139 *l.* 16 *s.* 3 *d.* “conform to state of accounts,” was also sued for in the former action, and the account then produced by the pursuer stated that sum to be due to *W. Gibson & Co.*, and he concluded for payment thereof to that company. That the pursuer was therefore precluded now from suing for that sum as due to him individually. If that sum was due by the defender at all, it could

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(a) See the Acts 29 G. 2, c. 16, and 33 G. 3, c. 2; and also an order in Council of the 11th of May 1803.

(b) See *Gibson v. Mair*, 1 Marshall, 41; *Gibson v. Service*, 5 Taunt. 433, and 1 Marshall, 119.

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not be due to the pursuer, but *Gibson & Co.* alone could allege claim to it, and the defender had long ago settled accounts with them.

By an interlocutor dated the 9th of *March* 1825, the Lord Ordinary repelled the defences, and decreed against the defender conform to the conclusions of the libel.

Stewart presented a representation against that interlocutor; but the Judicature Act (6 *Geo.* 4, c. 120) having passed before it was disposed of, the parties, in conformity with that Act, entered into condescendences and answers.

The pursuer, in the eighth article of his condescendence, stated the cause of the capture and condemnation of the *Washington* thus:—"In order to facilitate the purchase of the *Washington's* cargo of slaves, the pursuer had shipped by a *British* vessel, named the *Croydon*, from *London* for the river *Congo*, a quantity of muskets and gunpowder, which were to be delivered to the defender, or his order, on their arrival in that river; and the defender, before he sailed in the *Washington*, received a bill of lading of those guns and powder, which are accordingly entered in the general invoice-book of the adventure, referred to in article 5. The reason why the muskets and powder were shipped by the *Croydon* from *London*, was, that by the existing orders in Council, no foreign ship was allowed to carry these articles under certain penalties. After coming to anchor in the river *Congo*, the defender applied for, and received from the commander of the *Croydon*, delivery of the muskets and powder; but instead of carrying them ashore as he ought to have done, he very improperly carried them on board the *Washington*. This transaction was witnessed by a *British* letter of marque privateer, called

the *Prince of Orange*; the commander of which immediately went on board the *Washington*, and took possession of her as a prize, and afterwards carried her to *Barbadoes* for adjudication, on the ground that she had more guns and powder on board than was allowed by the sufferance from the custom-house at *Liverpool*." And the pursuer averred that no larger quantity of guns or gunpowder was shipped on board the *Washington* at *Liverpool* than was allowed by the custom-house sufferance.

The defender's answer to that article was, "That some days after the *Washington* had been moored in the river *Congo*, the defender received on board part of the guns and powder sent out in the *Croydon*, for the sole purpose of bartering for slaves. But it was denied by the defender that this was either the cause of the capture, or could have been a ground for condemning the ship (the guns and powder being by no means intended for the supply of an enemy), or that it was the duty of the defender to have carried the guns and powder ashore. The vessel was seized by the *Prince of Orange* cutter, Captain *Leyburn*, upon information given by a mutinous *American* sailor, whom the defender had caused to be punished, that the vessel had taken on board at *Liverpool* more gunpowder than was allowed by the Admiralty licence. In the Admiralty Court at *Barbadoes*, the defender showed, to the satisfaction of the Court, that the reception of guns and powder for the purpose of barter, from the *Croydon*, on the Coast of *Africa*, was not illegal; whereupon sentence of liberation was pronounced: but when costs were asked, Captain *Leyburn* appeared personally in Court, and instructed his counsel to state that he had several of the *Washington*'s crew who were ready to swear that more powder

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was shipped at *Liverpool* than was allowed by the licence. Now, the pursuer had the exclusive charge of, and was solely responsible for the outfit and shipment at *Liverpool*: and it was denied by him that more gunpowder was shipped at *Liverpool* than was allowed by the custom-house sufferance, and at all events the defender could not be made answerable for his conduct.

It further appeared from the pleadings that the pursuer held one-fourth share in the joint adventure; his partner, *William Broadfoot*, one-fourth; *James Broadfoot* (the consignor), one-fourth; *Thomas Moffat*, of *Edinburgh*, one-eighth; and the defender one-eighth: That the ship, cargo, outfit and premiums on insurances effected on the ship, were all paid for by *Gibson & Co.*, and exceeded 28,000*l.* (having received from the defender 1,400*l.* for his share in the *Washington* and cargo): That while the suit as to the legality of the capture of the *Washington* was going on in the Vice-Admiralty Court of *Barbadoes*, the ship and her cargo were there sold by arrangement between the parties, the proceeds to abide the decision: That the decree of that Court for restoration was appealed from, and reversed by the Privy Council, and the ship and cargo condemned as lawful prize to the captors: That *Gibson*, in 1811, brought an action in *Scotland*, in name of *Gibson & Co.*, against *Stewart*, for his proportion of the loss sustained in the adventure (stated by the pursuer to have exceeded 21,000*l.* including the forfeited premiums on insurances): but that action was dismissed in 1819, for want of proof that the pursuer's partner, who resided in *America*, authorised him to enter on the adventure or to bring that action: whereupon the pursuer brought the present action in 1822, in his individual name.

The following pleas in law were given in for the parties :—

For *Gibson* :—1. That loss arising from a joint adventure, must be borne by the several parties engaged, each in proportion to his share in the adventure. 2. That one of several co-adventurers, who has made advances of money or incurred loss, on the common account, is entitled to be indemnified by all the co-adventurers, in proportion to their several interests in the concern. 3. That the judgment pronounced in the former action brought by the pursuer on behalf of *Gibson & Co.*, dismissing that action on objection to the instance, but reserving to the pursuer to insist *privato nomine*, cannot be effectually pleaded as *res judicata* against his present action at his own instance as an individual. 4. That claims of compensation do not afford a competent ground of defence, unless verified by the production of liquidated documents of debt.

For the Defender :—1. That the pursuer's claim in the present action is contradicted by his statements in the former action, which was dismissed on his admissions that the claim then made, if due, belonged to *Gibson & Co.*, and on the ground that the pursuer individually had no title to sue for the claims of that company. The dismissal of that action was not qualified by any reservation in favour of the pursuer to bring a new action. 2. That the defender never having contracted with the pursuer as an individual relative to the adventure in question, is not responsible to him in that character for anything touching the adventure. 3. That the defender's claims of compensation against *Gibson & Co.*, and against the pursuer as a partner of that company, arise out of the adventure, and would form part of the accounting between the party with whom the defender contracted

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respecting the adventure and the defender. That party was *Gibson & Co.*; and if the pursuer, in contracting with the defender in name of that company, acted without its authority, and did not bind the company, neither can the defender be bound; as one of the contracting parties cannot be bound while the other is free. If the pursuer, therefore, must take on himself the whole consequences of the adventure as far as concerns the company, he must do the like as far as concerns the defender also.

The Lord Ordinary pronounced the following interlocutor the 1st of *February* 1827:—"Having considered the record in this cause, the revised cases for the parties, and whole process, repels the defences and pleas in law of the defender; decerns against him conformably to the conclusions of the libel, and refuses the prayer of his representation," &c.

Against that interlocutor the Appellant presented a reclaiming note to the First Division of the Court; and by leave of Court subsequently obtained, under the proviso in the 11th section of the Judicature Act (6 *G.* 4, c. 120), he stated this further plea to the action, viz., that, according to the pursuer's own showing, the action was not maintainable; that the facts set forth by him established that the adventure out of which the claims arose was a prohibited and a contraband trade: and in support of that plea the defender referred to two judicial decisions in the Court of Common Pleas at *Westminster*, upon two actions brought by the pursuer on some of the policies of insurance on the ship *Washington* and her cargo in this adventure, nonsuited the pursuer on the ground of its illegality (c): and in further support of that plea, the defender referred to the 2d, 3d, and 4th sections of the Act

(c) See *Gibson v. Mair*, 1 Marshall, 41; and *Gibson v. Service*, 1 Marshall, 119, and 5 Taunt. 533.

29 *G.* 2, c. 16 (*d*), and the corresponding enactments of the Act 33 *G.* 3, c. 2; and to an order in Council of the 11th of *May* 1803 (*e*). A minute of the defender's pleading on this point, and of the pursuer's answer, having been given in, the First Division of the Court pronounced the following interlocutor on the 8th of *March* 1828 :—"The Lords having resumed the consideration, &c., alter the interlocutor of the Lord Ordinary complained of, sustain the defence founded on the illegality of the adventure, and assoilzie the defender from the conclusions of the libel, so far as the same relate to the sum of 1,272*l.* 8*s.* 7*d.*, concluded for, and decern: also find the defender entitled to the expenses incurred by him in defending himself

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(*d*) By s. 2, it was enacted, that whatever quantity of saltpetre, gunpowder, arms or ammunition, prohibited by proclamation or order in Council to be exported, shall be shipped on board any ship in any port of *Great Britain* in order for exportation, contrary to such proclamation or order, shall be forfeited, and the owner shall forfeit in the proportion of 100 *l.* for every cwt. of saltpetre or gunpowder, or for every five-and-twenty arms; and 100 *l.* for every two cwt. of any species of ammunition.

By s. 3 it was enacted, that any person aiding or assisting in the shipping any saltpetre, gunpowder, &c. during the time it shall be so prohibited to be exported, shall forfeit 100 *l.* and treble the value.

By s. 4 it was enacted, that if any master of any vessel shall take on board, or suffer to be taken on board, any saltpetre, gunpowder, &c. for exportation during the time it shall be so prohibited to be exported, every such master shall forfeit 100 *l.*

(These prohibitions were re-enacted by the Act 33 *G.* 3, c. 2.)

(*e*) By the order of Council, dated the 11th *May* 1803, it was ordered, that all ships and vessels clearing out for the coast of *Africa* for the purpose of carrying on trade there, be permitted to take on board, as an assorted part of their cargoes, as much gunpowder, and as large a quantity of trading guns, pistols, cutlasses and flints, lead balls, bars and shot, as the exporters shall think necessary, provided that sufficient security be given to the principal officers of his Majesty's customs of the port in which the ships are fitted out, and before they proceed on their respective voyages, in treble value of the articles exported, that the same shall be expended in trade upon the coast of *Africa*; which security is not to be cancelled until proof of such expenditure has been made by the oath of the captain or master of the ship or vessel, in like manner as is prescribed with regard to spirits and *East India* goods used in carrying on that trade.

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against the conclusion of the libel from which it is annulled; appoint an account thereof to be given in, &c. And further, in regard to the other conclusions of the libel, remit the same to the Lord Ordinary to proceed," &c.

By a subsequent interlocutor of the 16th of Jan 1829, an interim decree for the expenses, awarded at 132*l.* 14*s.* 6*d.*, went out against the pursuer.

The parties, upon the remit to the Lord Ordinary, made up an additional record upon the pursuer's other claims against the defender, viz., the sums of 1,132*l.* 9*s.* 4*d.* and 139*l.* 16*s.* 3*d.*, mentioned in the conclusions of the libel. The pursuer contended that the declared illegality of the adventure did not affect these claims; that they were distinct and separate debts, against which the defender could not set off his claims or services in the illegal transaction. The first of those sums was composed of several alleged advances to the defender by the pursuer's agents in *Barbadoes*, for cloths, wages, fittings for the ship, and 745*l.* for the costs of the suit in the Admiralty Court there; and it was alleged by the pursuer that though the whole of this sum of 745*l.* was advanced to the defender on bills drawn on *Gibson & Co.*'s agents, he received that same sum a second time out of the proceeds of the sale of the ship and cargo; and that he charged twice in his accounts for the other items, composing the whole sum of 1,132*l.* 9*s.* 4*d.*

The defender, in his answer, denied these allegations, insisting that all the advances made to him by the agents were on account of the ship, and were extinguished by his own claims against the ship-owners; and that the part of the proceeds of the sale retained by him was according to the order of the Court, and was accounted for by him to the captors,

to whom the whole of the proceeds properly belonged, the seizure being declared lawful prize. He further insisted that there could not be any accounting legally enforced respecting the proceeds or expenses of an adventure which had been declared illegal; but if an account could be had, it would be found that the pursuer, instead of being a creditor, was largely indebted to the defender.

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The Lord Ordinary having reported the cases to the First Division, their Lordships, on the 6th of *June* 1834, pronounced this interlocutor:—"The Lords having advised the mutual cases on the points remaining undecided, repel the defences; find the defender liable in the sum of 745 *l.*, and also in the sums of 22 *l.* 10 *s.* and 16 *l.* 2 *s.* 6 *d.* *Barbadoes* currency, mentioned in the pleadings (*f*), with legal interest and commission as in the account stated in process, &c. Also find the defender liable to the pursuer in the sum of 139 *l.* 16 *s.* 3 *d.* with interest, remit to the Lord Ordinary to hear parties on defender's claim to remuneration, and pursuer's claim for remaining articles of said account.

The Lord Ordinary having, in pursuance of that remit, considered the revised minutes, by an interlocutor of the 30th of *May* 1835, repelled the defender's claim for remuneration, and also the pursuer's claim for the remaining articles of the account referred to; and decerned accordingly (*g*).

(*f*) These two sums were for freight of a cable to *Surinam*, and for insurance on it; and though paid by the agents of *Gibson & Co.*, were again charged by the defender, and payment received by him.

(*g*) The Lord Ordinary added to his interlocutor the following note: "On the first point, viz. the defender's claim for remuneration on account of his attendance and services in the *West Indies* during the proceedings which terminated in the condemnation of the vessel, the Lord Ordinary thinks that, in the circumstances of this case, it is inadmissible. It is a claim on equitable grounds advanced by the

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Both parties having presented reclaiming notes against this interlocutor, the Lords of the First Division pronounced an interlocutor the 16th of *December* 1835, on the defender's note, adhering to the interlocutor so far as it respected the claim for remunera-

defender, who was not only the master of the vessel but a partner in the adventure; and had the accounting for the ultimate loss proceeded agreeably to the principle assumed in the summons, the claim might perhaps have formed a very reasonable article in that accounting on the side of the defender. But the defender has pleaded the condemnation of the vessel, and the illegality of the contract, ascertained by that condemnation, in bar of all accounting or claim against him as partner for any share of the loss; and that plea has been sustained by the Court. Having taken the benefit of such a plea, he is not, in the opinion of the Lord Ordinary, entitled to make any demand on the score of services performed in relation to the adventure, and before it was terminated by the condemnation of the vessel.

"The Lord Ordinary can see no ground for the pursuer's next claim, in relation to the articles of the account forming the only remaining point in this discussion. These are certain items which were included in that account,—an account paid to the defender, first, by the bills drawn by him on *Dixon*, and afterwards paid to him a second time by *Hyndman*, and taken credit for by *Hyndman*, on settling with the captors for the proceeds of the vessel. By the former interlocutor of the Court, the pursuer has recovered the full amount of that account from the defender, of which he had received a double payment; and what the pursuer now demands is another repayment of certain articles which he says ought not to have been allowed to the defender at all, in either account. In any view of the case, the pursuer's claim is untenable. By the decision already pronounced, he is completely indemnified; and such being the case, and even taking his own view of the judgment, as proceeding on the ground that *Hyndman*, in claiming the amount from the captors, acted as his agent, it is impossible to see why he should claim the articles now in dispute from the defender, or how it can be relevantly stated that those articles ought not to have entered into the account at all. The case is now precisely the same as if there had been no previous payments to the defender by *Dixon's* bills, and as if *Hyndman*, viewing him as the pursuer's agent, had paid those items to the defender, and then taken and got credit for them, in accounting with the captors. Now, had that been done, it would seem a most extraordinary proposition to maintain that the pursuer was entitled to recover from the defender the amount of those very charges which he or his agent had got credit for from the captors, on the single ground that, whether justly or not, they had been actually paid to the defender."

tion; and remitting to the Lord Ordinary to dispose of what remained of the cause, and of the expenses.

The Lord Ordinary having accordingly further heard the parties, pronounced an interlocutor on the 14th of *January* 1836, in conformity with the special finding contained in the interlocutor of the 6th of *June* 1834, and decerned against the defender for payment of the several sums of 745 *l.* sterling; 22 *l.* 10 *s.* and 16 *l.* 12 *s.* 6 *d.* *Barbadoes* currency, with interest from the year 1807; and 139 *l.* 16 *s.* 3 *d.* sterling, with interest from 1816; with expenses of the second and third conclusions of the libel.

The defender presented a reclaiming note against that interlocutor, but the Lords of the First Division, by interlocutor of the 20th of *May* 1836, adhered.

The defender (Mr. *Stewart*) appealed to this House against the said interlocutors of the 9th of *March* 1825; of the 1st of *February* 1827; of the 8th of *March* 1828,—in so far as it did not assoilzie this Appellant in *toto*;—of the 6th of *June* 1834; of the 30th of *May* 1835,—in so far as it did not find this Appellant entitled to remuneration;—of the 16th of *December* 1835; and of the 14th of *January* and 20th of *May* 1836.

The pursuer (Mr. *Gibson*) presented an appeal against the interlocutor of the 8th of *March* 1828, in so far as it sustained *Stewart's* defence founded on the alleged illegality of the adventure and assoilzied him from the first conclusion of the action relative to the sum of 1,272 *l.* 8 *s.* 7 *d.*; and also against the interlocutors of the 30th of *May* and 16th of *December* 1835, in so far as they repelled his claim for the remaining articles of the account referred to.

The appeal and cross appeal were heard together on the 23d, 25th, and 26th of *January* 1838.

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The *Attorney-general* (Sir J. Campbell), and Sir *William Follett*, for the Appellant *Stewart* :—The Respondent had neither title nor interest to maintain this action, because the adventure, under which he claims, was never effectually formed ; and because, at all events, it was not he, but *William Gibson & Company*, who made the alleged furnishings and advances, of which payment is sued for ; and the Respondent holds no right, either directly or indirectly, to the funds of that company. But supposing the advances to have been made by the Respondent, still he is not entitled to claim the sums in dispute, in respect that that adventure, which he did attempt to carry into execution, and in consequence of which the claim is made, was illegal.

The Respondent's claims to those sums which have been found due to him by the Court below, are not well founded on their merits. But if the interlocutor holding those sums to be unconnected with the adventure, and therefore actionable, be well founded, it is submitted to be indisputable that the claim of the Appellant for remuneration for services performed to the adventure under special employment, is also unconnected with it, and ought to have been sustained.

As to the cross appeal, and first as regards the interlocutor of 8th *March* 1828, the facts proved show that the Appellant entered into a fraudulent agreement with the owners of the *British* ship *Croydon*, for the purpose of the exportation of warlike stores, in violation of the law of this country ; that is, that certain arms and gunpowder which could not legally be carried from this country by the *American* ship *Washington*, should be smuggled by the *Croydon*, and delivered to the *Washington* in the river *Congo*, in *Africa*. And it also appears that the articles (in the

account No. 8) dismissed by the Court, were either included in the sum of 745*l.* awarded to the Appellant *Gibson* by the Court, or were paid out of the funds which belonged to the captors.

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Dr. *Lushington* and Mr. *Tinney*, for *Gibson*, first as Respondent in the original appeal, submitted that the Appellant *Stewart* having twice received payment from the Respondent's agents in the *West Indies*, of the amount of the costs of the Admiralty suit, and having accordingly, by his letters written on his arrival in *Britain* and referred to in process, desired that he should be debited with the amount of *Hyndman's* bills for the second of those double payments, was properly found liable in restitution thereof to this Respondent. And as to the claim for remuneration for services, the Appellant having pleaded the illegality of the adventure in bar of all claim of accounting against himself as a partner therein, was not entitled, upon the supposition of that plea being well founded, to insist on any claim of remuneration for services alleged to have been performed by him in relation to the adventure, before its termination by the condemnation of the vessel. With respect to the cross appeal by *Gibson*, it was argued on his behalf that after the original record was closed, upon the statements and pleas therein set forth, it was not competent for the Court, in reviewing the judgment of the Lord Ordinary, to take into their consideration the new averment in point of fact, then stated in relation to the alleged illegality of the adventure, or the reports of the judgments of the *English* Courts, founded on as evidence in support of that averment. The reports of those judgments founded upon by the Appellant *Stewart*, ought not to have been received

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by the Court of Session as evidence of the facts therein contained. The statements of fact set forth in the closed record by the Appellant himself, and particularly in his revised answers to article 8 of this Respondent's revised condescendence, are conclusive against the truth of his new averments, as to the illegality of the adventure, and the grounds upon which the vessel was condemned.

Neither the statute of the 29 *Geo.* 2, c. 16, as confirmed by 33 *Geo.* 3, c. 2, nor the Order in Council of the 11th *May* 1803, founded on by the Appellant, contains any substantive prohibition against the exportation of arms to the coast of *Africa*. On the contrary, those statutes refer to the exportation of such articles only as shall be prohibited by proclamation or Order in Council to be exported. And the regulations of the Order in Council of the 11th *May* 1803 are not themselves prohibitory, but permissive, in regard to the exportation of such articles, under the conditions therein specified. At all events, with reference to the facts set forth in the closed record, all the conditions and regulations of the Order in Council were duly complied with by the Respondent in this instance. But if there was any illegality in the exportation of arms, which the Respondent does not admit, such illegality does not extend to, or vitiate the general adventure, which was conformable to the laws then in force; and, consequently, the Respondent ought not therefore to be barred from recovering from the Appellant his due proportion of the loss.

The remaining articles of the account No. 8 of process, referred to in the interlocutors of the Lord Ordinary, of 30th of *May*, and of the Court, 16th of *December* 1835, being composed of personal advances to the Appellant by *Dixon*, were not proper charges

against the Respondent: but having actually been included in *Dixon's* account with the Respondent, and in bills drawn by the Appellant upon the Respondent in favour of *Dixon*, the Respondent, who paid those bills, is entitled to recover from the Appellant the amount of the advances: and it forms no sufficient or relevant answer to the Respondent's claim in this respect, that the Appellant has already been found liable to account for a second payment of the same advances, which, subsequently to the date of the bills in favour of *Dixon*, he had obtained from the Appellant's other agent, *Hyndman*, upon the false pretences mentioned in the pleadings.

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The *Attorney-general* replied.

The *Lord Chancellor*:—Farther investigation will be necessary before I state my opinion on this case. At present I have great difficulty with regard to the party's right to bring the action. It does not appear that in the Court of Session a practice, which is necessary for the purpose of administering justice in this country, both at law and in equity, prevails; viz. that those with whom a contract is made should be the parties to sue upon it. Beyond all doubt, the contract in this case was not made with the *individual* who brought the action; indeed he does not state that it was: on the contrary, the summons states the contract to have been made on behalf of the firm of *William Gibson & Company*. This is a question with respect to which it is very important to have further information as to the practice in the Court of Session, before we lay down a rule which shall be binding on all the Courts in *Scotland*.

With regard to the question of illegality, I have no doubt that the Court of Session was right in pro-

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nouncing this transaction illegal upon the facts as they appear in the printed cases. It is not disputed at the bar, that if there had been a contract between the parties to do that which subsequently took place it would be illegal. If the contract had been that an adventure should go out, relating in part to certain articles of merchandise which might be legally taken, and in part to arms and ammunition which by the law of the country could not be legally taken; and it was thereby agreed that, in order to evade the law, no part of the arms and ammunition should be carried out in the ship which was to carry out the other goods, but should be carried in another ship to a place out of the immediate power and jurisdiction of this country, and then should be transhipped into the ship carrying the merchandize; that would be a transaction illegal, as being in violation of the *British* law, and a contract upon which no relief could be given. Now we find, in point of fact, that this is the nature of the transaction in question, which was carried on under the immediate management of the party now suing on the contract: and all your Lordships have to do is to make up your minds whether that which subsequently took place did form part of the contract between the parties or not: whether the undoubted illegality of one part of the transaction would not affect that part of the transaction which is alleged to be legal. Seeing what took place, and looking at the invoice, I cannot doubt that the whole formed one transaction; and consequently that the whole was affected by the illegality which it is admitted existed with regard to part of it. If your Lordships should be of that opinion, the only question will be, how far the illegality of the transaction affects the particular sums in question between the parties.

Lord *Brougham*:—I have felt great embarrassment from the beginning, in consequence of not having before us any note of the opinions which were pronounced by the learned Judges who dealt with the case in the Courts below, and of the reasons upon which those opinions were founded. Upon some branches of the case we may have less doubt than upon others, particularly the illegality of the transaction: but then we have not any means of telling in what light the Courts below, in the judgments which they ultimately pronounced, regarded two most material parts of the case, which form the subject of the original appeal: I mean the question of parties, which extends over and pervades the whole case, the matter of the cross appeal as well as the original appeal; and the question as to the sums of 745*l.*, 139*l.*, and the 22*l.* and 12*l.*, which formed the subject of the cross appeal alone. And this is the more to be regretted with respect to these last-mentioned sums, inasmuch as we are left entirely in the dark, and without the power of forming even a conjecture of the grounds upon which their Lordships came to one judgment with respect to the 1,272*l.*, assoiling the defender from that claim on the ground of illegality; and to another judgment respecting the lesser sum; allowing that claim, although to all appearance that claim comes within the scope of the argument of illegality as much and in the same way, and for the same reasons, in which and for which the judgment proceeded against the claim for the larger sum, as arising from an illegal contract.

In stating to your Lordships what my opinion is respecting the merits of the case, I shall take first that objection which relates to the right of the party who has brought the action; because that goes over

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the whole case, both the original and the cross appeal : it is not the same kind of objection as a plea of abatement in our Courts, for the nonjoinder of a defendant, but it is rather the case of a nonsuit by the nonjoinder of a plaintiff. In the one case it may be matter of form, but in the other it is matter of substance. If a contract is made by *A.* with *B.*, *A.* of course may be sued upon that contract by *B.*, and *vice versa* ; but if a contract is made by *A.* and *B.* with *C.*, shall *A.* alone sue *C.* upon that contract, unless he produces an authority from *B.*, or a release by *B.*, which comes to the same thing ? In both of these cases *B.* must sue as well as *A.* ; for doubtless the contract enuring to the benefit of both, being made by both, the performance of it must enure to the benefit of both, and both, and not one, shall have a right to come into Court against the other party, and sue the other party. Nothing has been stated in this case which at all satisfies me that there is, either in point of form or in the substantial law of *Scotland*, any difference with reference to this particular from those principles which regulate our Courts of Equity as well as of Law in this country : nothing which shows that the principles on which the Courts of *Scotland* proceed differ from those principles which by natural justice, or even according to the plain dictates of common sense, must be the rules of proceeding in all Courts of Law or Equity. Nevertheless, I am disposed to agree with my noble and learned friend in not pronouncing at present upon this question, although it would be a shortening of the whole case, both in the original and the cross appeal : because it is barely possible there may be some rule which we are not aware of ; and it may be as well that we should postpone our decision for further information.

I must proceed, in the second place, to say that

I do not think that question will necessarily arise in this case at all. First, with respect to the cross appeal: upon that I entertain no doubt whatever. The question has been disposed of in the Court below, as regards the sum of 1,272*l.* 8*s.* 7*d.*, upon the ground that there was an illegal agreement in which this voyage and speculation had its origin; that that illegality rides over the whole adventure and speculation; and that *ex dolo malo non oritur actio*. Perhaps, correctly speaking, *dolus malus* does not apply to what is illicitly done, but to what is *malum in se*; so that there is no *dolus malus*, properly speaking, here, but there is *pactum illicitum*, and there is *dolus malus* in evading the positive enactments of the municipal law. Now *ex pacto illicito non oritur actio*. But it is said that here there was a legal agreement completed on or before the 27th of *May* 1806, and that that is not vitiated and rendered illegal by a sort of reaching backwards, because on the 2d of *June* afterwards, on the *African* coast, something was done which must be admitted to be illicit and in contravention of our municipal law. It is said that the two things cannot be connected together. Now this is a question of fact; and the question is, whether the circumstances of the case do not afford sufficient evidence, I should say irrefragable evidence, of the two proceedings being connected inseparably together, both forming parcels of one transaction, both making up one adventure in trade, and that adventure becoming illegal altogether, because bottomed in and originating from that which was in itself illegal.

We are asked to go a great way, when we are called upon to believe that these two adventures were not one transaction; we are asked to go a little further, when we are called upon to believe that they had not

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a close connexion with each other : but we are asked to go a length which I am sure no man of ordinary common sense and understanding can accompany the Respondent in going, when we are called upon to say that there was no connexion whatever between the two ; and that the one was entered into without any prospective looking forward to the other ; and that the other was entered into without any retrospective view to the former. Yet all this we must believe, before we can admit the argument of the Respondent : it is absolutely necessary for his case, before he can overturn the decision of the Court below brought here by his cross appeal, that we must believe all this before we can suppose that the matter, admitted to be illegal matter, was collateral to the legal matter, and that the legal was independent of, and uninfluenced and unaided by the illegal matter. Can any man believe that so material an article as gunpowder to a great amount, muskets, flints, and other arms and ammunition to a still larger amount, a chest of 400 stands, and another chest of 200 stands of arms ; that all this was an after-thought, just a sudden accidental fancy, that seized upon these slave-traders after they had wholly completed their adventure, had arranged their outfit, and had contracted with one another for the carrying on of their crime (which used to be called a trade, but which has now obtained its proper appellation by an Act of Parliament, which I had the happiness to bring in with as great pleasure as anything I ever did in my life ; I mean the Felony Act of 1811), that in the arrangement of this adventure, in the conspiracy by which they planned a crime to be perpetrated upon the coast of *Africa*, the powder and muskets had never entered into their imagination up to the 27th of *May* ; but that, having arranged a cargo

of beads, having got an assortment of tartan hussar dresses, among other things, for the poor natives, whom they were going to plunder and torture and murder in carrying them through the horrors of the middle passage,—that these tartan dresses and beads by which they were to get the mothers to sell their children, and the different members of families to sell their relations,—that all these were put on board the vessel on the 27th of *May*, and that they never thought of muskets and gunpowder and flints; till when? the time is material here: till the 2d of *June*; so very long a period after as no less than six days. No less than six days afterwards it was that they suddenly thought, “What are we doing? We are going to *Africa*, but we are going to rob and murder the people there, and therefore we must have gunpowder and muskets. We are going to get the poor people to help us in our robbery and murder, and therefore we must have beads and other things: therefore let us go and illegally put them on board; and as we cannot put them on board at *Liverpool*, let us put them on board at the river *Congo*.”

Now it is as to that part of the adventure we are called upon to judge. We are called upon to say that this was a totally collateral and unconnected adventure, wholly foreign to that which happened six days before. My Lords, this is totally impossible, and I really feel that I ought to apologise for having dwelt so long upon it. I am perfectly clear that this is one transaction, one voyage out. The invoice speaks no other language; the book, which has been produced in the proceedings below, speaks no other language; the abstract jumbles them altogether, and mixes them all up as one transaction; the party is debited with the whole. But above all, the whole

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scope and circumstances of these proceedings plainly show that it is one united joint connected transaction; not two several transactions. My Lords, even if I had more doubt than I have (I say I have none), I should really think that it would not become your Lordships, upon a mere matter of fact, to be very ready to reverse the decision of the Court below: that when four learned Judges have drawn a conclusion upon facts, that you should take another view of these same facts; and having no other materials whereby to modify the opinion arrived at in the Court below, should say, from thence we arrive at an opposite conclusion. Upon the whole, therefore, I have no doubt whatever, but entirely agree with my noble and learned friend, that the cross appeal must be dismissed, and with costs. I do not see a shadow of ground for this cross appeal.

Now, my Lords, I have thus disposed, in my humble opinion, of part also of the original appeal. But I cannot divine what the Court meant by taking a distinction between the 139*l.* 16*s.* 3*d.* and the 1,272*l.* 8*s.* 7*d.* This matter seems to me to be in one or other of two predicaments. Either there is a blunder altogether (I speak with great respect), and this 139*l.* is part of the 1,272*l.* 8*s.* 7*d.*, because that sum of 1,272*l.* 8*s.* 7*d.* is called an eighth—an eighth of what? How does the sum of 139*l.* 16*s.* 3*d.* happen to get out of the scope of that dividend, of which the 1,272*l.* 8*s.* 7*d.* is the quotient? By the process of dividing by eight, I think there is nothing suggested to show why the 139*l.* 16*s.* 3*d.* did not come within the scope of that process of division: if so, it is disposed of by the part of the judgment assoiling the Appellant from the 1,272*l.* 8*s.* 7*d.* Or, suppose it is a separate sum from the 1,272*l.* 8*s.* 7*d.*, then does

not it come within the scope of the illegality? How can you distinguish the 139*l.* from the 1,272*l.*? I can see no difference. I am therefore perfectly ready to say that the judgment cannot stand as regards the 139*l.* 16*s.* 3*d.*

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The two small sums of 22*l.* and 12*l.* may, I think, be put out of the case; but with respect to the 745*l.*, that is the part of the case as to which I feel most doubt, because it is involved in considerable obscurity as to the ground upon which the Court below proceeded. I am inclined, however, to consider that, either upon the ground of want of parties in this case, which would ride over this part as well as over the other, or upon the ground that at all events *Gibson* cannot claim this sum, the decision here is wrong. But I think it right to add that I do not see how the question of illegality affects the 745*l.*, though I am of opinion that it affects the 1,272*l.* and the 139*l.* If I should ultimately feel prepared to advise your Lordships that that has been well allowed as not coming within the scope of the illegality, and also that it has been well allowed, because well claimed, inasmuch as there is no foundation for the alleged want of proper parties (and only upon that assumption can it be said that it is well claimed), if it should be found upon further inquiry that there is no foundation for the objection of the want of proper parties, I do not see how there should be any allowance made by way of set-off in the nature of a *quantum meruit* to the other party. Though I feel the pressure of the argument of the want of parties, I feel also that it would be setting off a *quantum meruit* against a legal demand. But as at present advised, I am inclined to think that we shall never come to that set-off at all;

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and that, upon further inquiry, in all probability your Lordships may be advised to reverse the whole of the decision on that point. I am quite clear that, with respect to the cross appeal, you ought to dismiss it, and affirm the interlocutors therein complained of, with costs of appeal.

I have entered into the matter at this great length, with a view to save your Lordships the trouble of hearing any further arguments, when you come ultimately to decide the case. It may be understood that, unless we come to another opinion upon making further inquiry on that part of the case, what has now been said may be considered as the reasons for reversing the judgment. If we come to another opinion, of course it will be affirmed.

My noble and learned friend (the Lord Chancellor) has suggested to me, that though it is quite clear what we shall do on the cross appeal, it is not usual in deciding two appeals to decide the cross appeal first, and then to consider the original appeal. It is quite clear what the judgment will be upon the cross appeal. My noble and learned friend agrees with me in imposing upon the parties the trouble of bringing a note of what passed in the Court below; in all probability such a note would have enabled us to dispose of it at once. We know that in *Westminster* Hall it has been the usual practice, since the time of Lord *Kenyon*, upon the important questions that go from the Court of Chancery to the Courts of Common Law, that they certify their answers without giving reasons. That has been found so inconvenient that the Courts are now disposed to come back to the old and better practice. I hope the Court of Session will not be offended if we apply to them the same obser-

ventions which have been applied to the Courts of *Westminster* Hall, and that they will take the trouble of giving their reasons as well as giving judgment. Perhaps a knowledge that it has been proposed here will be an inducement to those very learned persons to adopt that course. I have the greatest respect for them, and wishing to have their reasons is a token of our great respect.

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The *Lord Chancellor*:—My Lords, upon the principal question in this case, the illegality of the transaction from which the litigation between the parties arose, there is no doubt, and it has been very properly adjudged to be illegal by the Court of Session. It is not disputed that it would have been a violation of the Acts of Parliament to have exported the arms and ammunition in the *Washington*; therefore they were sent in another ship for the purpose of being transhipped into the *Washington*, when it might be thought safe so to do; and this was accordingly done upon the coast of *Africa*, and the ship and cargo being seized, were afterwards condemned. All the questions between the parties must therefore, in my opinion, be considered with the assumption that the adventure was illegal; and this will dispose of *Gibson's* appeal against the interlocutors of the 8th *March* 1828 and the 10th *June* 1829; and it appears to me that necessarily carries with it the reversal of the interlocutor appealed from by *Stewart*, so far as the Court found him liable to pay 139*l.* 16*s.* 3*d.*, which appears to be the value of certain parts of the cargo, which were applied by *Stewart*, as the captain, in paying a debt he owed to some natives. If the whole adventure was

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unlawful, there can be no right to recover this sum. If, the cargo having been sold, an action had been brought for the proceeds, and the illegality of the adventure had been set up and established, the pursuer could not have recovered; and so the Court of Session has determined. Why is this sum, being a part of the adventure, not to be affected by the same rule? If the captain had sold the goods represented by the 139*l.* 16*s.* 3*d.*, he could not, according to the decision, have been made responsible for the proceeds. Upon what principle, then, has he been made responsible for them, because, instead of receiving value for them in money or goods, he has received value in the liquidation of his own debt? The captain indeed alleges that the goods were not so applied until after the capture, by which they ceased to be the property of the pursuer. In neither case, however, can the pursuer be entitled to recover the value of them. This part of the case is also involved in the question, whether the pursuer can maintain a suit founded upon transactions, not with himself individually, but with *Gibson & Company*, in which firm he was a partner: and as this question, if decided in the negative, will conclude all the subjects of appeal against the pursuer, it requires particular consideration.

[His Lordship, after stating the facts before stated as to the origin of the adventure, proceeded:—The accounts of the ship were kept under the heading of “Ship *Washington* and Owners, with *William Gibson & Company*.” The ship having been captured and ultimately condemned, though ordered to be released by the Court of Admiralty in *Barbadoes*, expenses on account of the suit there, and on account of the ship and of the defender personally, were incurred, which

were paid to the agents there by bills drawn upon *Gibson & Company*, who paid them, and some of the items, comprising the sum for which such bills were drawn, constitute part of the pursuer's demand.

In consequence of the failure of the former action in the name of *Gibson & Co.*, the pursuer has brought the present action in his own name, not alleging any transfer to him of any interest of his partner *William Broadfoot*, but claiming right in himself to sue for and recover the sums alleged to be due from the defender on account of this joint adventure, although all the money transactions were with *Gibson & Company*, and although the pursuer had only one-fourth and the defender one-eighth of the adventure. It does not follow, because one partner exceeds the limits of his authority—which was one ground on which the former action was dismissed—as between himself and his copartners in any transactions he may enter into, that the firm is not pledged to those with whom the dealing takes place in the name of the partnership. A decision, therefore, that the pursuer had not the proper authority to bind *William Broadfoot*, his partner in those transactions, proves nothing in the question whether he can alone sue those with whom he dealt in the name of the firm. That the funds of *Gibson & Company* were employed in the adventure is admitted; that they paid the bills drawn from *Barbadoes* is a fact common to both statements. How the account stands between *Gibson* and *William Broadfoot* does not distinctly appear, although it is alleged that *Gibson* is debtor to his partner; but under such circumstances, how can the pursuer be entitled to receive the repayment of what the firm of *Gibson & Company* have so advanced? Yet such would be the result of the interlocutor

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decerning for payment to the pursuer of the 745*l.* If, therefore, it were necessary to decide this question, I should not hesitate to advise your Lordships to reverse the interlocutor appealed from by the defendant, upon that ground alone. There appear to me, however, to be other grounds which make it unnecessary to decide expressly upon that point. The interlocutors of the 6th of *June* 1834, 14th of *January* 1836, and 20th of *May* 1836, find the defender liable to pay to the pursuer 745*l.*, 22*l.* 10*s.*, and 16*l.* 12*s.* 6*d.* These sums are composed of the expenses in the Admiralty Court at *Barbadoes*, and some expenses incident to the ship whilst there, and said to have been due to the defender, who was there employed in attending to the interest of the owners. The amount was advanced by *Dixon & Company*, the agents in the island, and repaid to them by bills drawn by the defender upon the house of *Gibson & Company*, by whom they were paid, and so constituted items in the account of that house with the ship. If the defender had by those means obtained payment of sums to which he was not entitled, such overcharges might properly be the subject of investigation in settling the accounts of the adventure, but they could only be items in such account; and if from the illegality of such adventure no legal investigation of such accounts could be enforced, upon what principle can the repayment of particular items of such accounts be decreed? The objection applies to every item; and though the particular sum should appear to have been improperly charged, it is impossible, without taking the whole account, to know whether it ought to be repaid, or merely to be disallowed in the account. It appears, however, that by far the greater part of these charges (that is, all the

expenses in the Admiralty Court, were properly paid by *Gibson & Company* on account of the adventure, being the expenses of protecting the property against the claim of the captors, and which defence was successful in the island. But these expenses, it is said, were paid twice over, the amount having been deducted from the proceeds of the sale of the ship, and such appears to have been the fact; but such deduction was made from the proceeds, which were the property of the captors, and not of the pursuer, or of *Gibson & Company*; and though apparently improperly made, no injury was thereby done to the pursuer. If the payments were properly made by *Gibson & Company* in the first instance, no right to recover back the amount can arise from their having been improperly placed to the account of, and so improperly paid by, the captors.

It was argued that this deduction, having been made by order of the Admiralty Court at *Barbadoes*, amounted to an adjudication that the sums ought to be paid out of the proceeds of the ship. This, however, does not appear to be so, the order of the Court of Admiralty being only to permit the deduction till the account should be settled; and it appears that no part of the 745*l.* paid to *Dixon & Company* came to the hands of the defender. These payments, too, are subject to the same observation, that they were transactions with *Gibson & Company* and not with the pursuer, and that they constitute only items in the account of the adventure, the illegality of which precludes all parties from asking the adjudication and assistance of the Court, and therefore equally precludes the discussion of any particular items of the account. For the same reason, and upon the same ground, I think the defender is precluded from claiming remuneration: indeed, as the pursuer recovers nothing in the action,

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this claim of the defender cannot arise. The result, in my opinion, is that the interlocutors appealed from by the defender in the action ought to be reversed, so far as they find him liable to pay anything to the pursuer, and to pay costs to him : on the contrary, the pursuer ought to pay the costs below of the defender, as he was, by the interlocutor of the 14th of *January* 1836, ordered to pay the costs of such part of the suit in which he was then held to have failed. Of course there can be no costs of the appeal by the defender. The appeal by the pursuer must, I think, be altogether dismissed, and with costs.

Lord *Brougham* :—I agree in the view taken by my noble and learned friend of this case. The whole rests manifestly upon the illegality of the transaction, it being unnecessary to have recourse to the other ground, though on that also I concur with my noble and learned friend ; I mean with respect to the partnership. It is not true, as it was attempted to be argued, that this decision respecting the illegality must rest upon importing into this cause the judgment in the Court of Common Pleas in the insurance case(*g*). That judgment is not imported here. The authority of the case is upheld, but as to the facts we have no right to go to the Court of Common Pleas. We must apply that judgment as an authority in law to the facts found in this case ; and the facts in this case are perfectly sufficient to enable us to apply to it the authority of the judgment in point of law, that judgment being upon the legality or illegality of the contract, and the facts in the case showing what the transactions were whereunto that contract bore reference.

(*g*) *Gibson v. Service*, 1 Marshall, 119, and 5 Taunt. 433.

The facts are stated in the eighth article of the pursuer's own condescendence(*h*). It is needless to remind your Lordships that we have in this case nothing to do with the illegality of the slave trade; this transaction was some time before that trade was put down by law. The pursuer had shipped by a *British* vessel named the *Croydon*, from *London*, for the river *Congo*, a quantity of muskets and gunpowder, which were to be delivered to the defender, or his order, he being the supercargo of the *Washington*, on their arrival in that river; and the defender, before he sailed in the *Washington*, received a bill of lading of those guns and powder. Of what guns and powder? Of the guns and powder shipped in the *Croydon*. Now it was legal to ship those guns and powder in the *Croydon*, a *British* vessel; but it was illegal to ship them in the *Washington*, a foreign vessel; but nevertheless, the supercargo, who had the management of the whole adventure, and who actually sailed in the *Washington* for the river *Congo*, received a bill of lading of those guns and powder, "which are accordingly (says the party himself) entered in the general invoice book of the adventure referred to in article fifth." And when we look to article fifth, we find it is a duplicate of the invoice book of the ship, cargo thereto relating, outfit and insurances, and "relative bill of lading conform to foresaid invoice book, signed by the master, *David Adams*, in favour of the defender (that is *Stewart*) as supercargo:" so that it is perfectly manifest that this indissolubly connects the adventure in the *Washington* with the proceedings in reference to the cargo in the *Croydon*; and the Court of Common Pleas thought that the

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(*h*) *Vide supra*, p. 712.

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voyage of the *Washington* was in fact as much altogether an illegal voyage, as if the cargo had been originally shipped (which it could not legally be) in the foreign vessel, the *Washington*, and not in the *Croydon*. And, as one of the learned Judges below very properly observed, there was nothing in this proceeding to prevent, instead of the transshipping of these goods (the powder and stores, and so on) in the river *Congo*, their being transhipped in the river *Thames*, and shipped to *America* in contravention of the order in Council. The transshipment made in the river *Congo* to the *Washington* is alleged to have been contrary to the orders of the master of the cargo. But supposing he had landed the goods, as it was contended he had a right to do, and not put them on board the *Washington*, still the question is, whether the sending them to the river *Congo* in the *Croydon* was not merely colourable, in order that they might be under the control of the defender, who had the charge of the foreign vessel : and therefore it does not depend merely upon the fact, which is admitted, of his having taken the goods on board the *Washington*. It appears evidently what the intention of the parties throughout the whole was ; and even if the goods had been landed, still the evidence would, in my opinion, have gone far to prove the illegality of the transaction.

“Ordered and adjudged by the Lords, &c., that the interlocutors complained of in the original appeal, in so far as they entertained any of the conclusions of the libel and did not assoilzie *D. Stewart* from the whole of the said conclusions, with expenses of the action, be reversed : and that the said interlocutors, in so far as they find the said *D. Stewart* is not entitled to

any remuneration for his services, be affirmed. And it was further ordered, that the expenses of the action in the Court below, in so far as the same relate to any claim made by the pursuer against the defender, be taxed according to the practice of the said Court, and be paid by the pursuer to the defender. And it was further ordered and adjudged, that the cross appeal be dismissed this House; and that the interlocutors, so far as therein complained of, be affirmed. And it was also further ordered, that the Appellants in the cross appeal pay to the Respondent therein the costs incurred in respect of the cross appeal; the amount thereof to be ascertained by the Clerk Assistant."

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1838:	CLEE and Others	-	-	-	-	<i>Appellants</i> ;
June 11. 14.	The Rev. GEORGE HALL, Clerk					<i>Respondent</i> .
18, 19.						
1840:	GODSON and Others	-	-	-	-	<i>Appellants</i> ;
June 1.	The said G. HALL	-	-	-	-	<i>Respondent</i> .
August 4.						
	WHEELER and Others	-	-	-	-	<i>Appellants</i> ;
	The said G. HALL	-	-	-	-	<i>Respondent</i> .

Vicar.
Endowment.
Privy Tithes.
Pleading.

TO a vicar's bill for an account of all small tithes, the defendants answered that the right to all tithes, as well small as great, became vested in the rector, and in the owners of the lands by grants and conveyances, and that they and their tenants held the lands, with the tithes, or free from all tithes whatsoever; but that some occupiers paid annually to the vicar, in respect of their houses, certain small sums in the name of "privy tithes," which the defendants alleged were personal tithes, and not compositions for small tithes. The vicar, unable to produce an endowment, gave secondary evidence showing that the vicarage was endowed generally with small tithes. There was no evidence that any small tithes were ever paid to or claimed by the rector, or the persons who become entitled to the rectory.—HELD,

1. That the defendants, after failing to show title to the small tithes in themselves or the owners of the lands, could not be heard to say that the small payments in the name of privy tithes were compositions.
2. That, in the district in which those lands are situated, privy tithes are not personal tithes, but are the same as small tithes.
3. That where there is evidence that the vicarage was endowed with small tithes, the vicar's right to them is established against all occupiers of lands within the parish as to which no particular discharge is proved; although no small tithes have ever been paid by them.
4. Where any of the defendants proved a particular discharge of the lands in his occupation, or showed that they were originally part of the glebe lands, the vicar's bill against them was dismissed with costs, but without costs as to such defendants as did not set up and prove that defence in the Court below.

IN *July* 1833, the Respondent, as vicar of the parish of *Tenbury*, in the county of *Worcester*, filed three

any remuneration for his services, be affirmed. And it was further ordered, that the expenses of the action in the Court below, in so far as the same relate to any claim made by the pursuer against the defender, be taxed according to the practice of the said Court, and be paid by the pursuer to the defender. And it was further ordered and adjudged, that the cross appeal be dismissed this House; and that the interlocutors, so far as therein complained of, be affirmed. And it was also further ordered, that the Appellants in the cross appeal pay to the Respondent therein the costs incurred in respect of the cross appeal; the amount thereof to be ascertained by the Clerk Assistant."

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ther with the rectory and lands, after they became vested in *Andrews*, were disposed of by him, and the tithes have ever since belonged to those who were from time to time owners of the lands, and their tenants. They admitted that small payments had been made to the vicar from time to time by some, but not all the occupiers of farms in the said hamlets, in the names of "privy tithes;" which they said were payments in the nature of personal tithes, obventions, or oblations, by the occupiers of houses only, and not as compositions for tithes of any titheable matters arising within the said three hamlets.

The material parts of the pleadings and evidence on both sides are set forth in Messrs. *Younge & Collyer's Reports*, vol. 2, p. 153, together with Mr. Baron *Alderson's* judgment.

By his Lordship's decrees in the three causes, all dated the 28th of *June* 1836, it was ordered and decreed that it be referred to the Master to take accounts of the titheable matters and things (other than and except corn, grain and hay) had and taken by the Appellants respectively from and upon their respective farms and lands since *Michaelmas* 1827, and of the tithes thereof; and the Master was to set a value on such tithes, and state the sums due from the Appellants respectively for the same: And it was ordered and decreed that what should be found due from the Appellants respectively, upon taking the said accounts, should be answered and paid by them respectively to the Respondent. And it was further ordered and decreed that it be referred to the Master to tax the said Respondent his costs of the said suits, so far as regarded the Respondent's claim to the tithes of the several matters and things of which accounts were directed; and that such costs, when taxed

should be paid by the Appellants. And it was ordered and decreed that the Respondent's bills, so far as regarded his claim to the tithe of hay, be dismissed with costs to be paid by him to the Appellants.

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The appeals were against these decrees (except so far as they dismissed the Respondent's bills with costs, as far as they prayed accounts of tithes of hay), and they came to be heard on the 11th of *June* 1838.

Mr. *Boteler*, of counsel for the Respondent, addressing the House before any of the appeals were opened, asked their Lordships if they would hear two counsel for the Appellants in each, the same point being raised in all.

The *Lord Chancellor*:—If the parties require it, they are all entitled to be heard; but in that case the course the House would recommend is, that counsel should arrange among themselves who shall open the discussion.

Mr. *Pemberton* (with whom were Mr. *Maule* and Mr. *Younge*) said he was leading counsel in the first appeal, but of the other two he knew nothing. He then proceeded to open that appeal:—The three bills were filed just before Lord *Tenterden's* Act^(a) came into operation. There was no evidence in the causes that the Respondent, as vicar of the parish of *Tenbury*, is entitled, by endowment, or usage, or prescription, to tithes of any matter whatsoever arising within the hamlet of *Berrington*, in which the most of the lands occupied by these Appellants are situated. The Respondent is the first vicar who demanded these tithes, which have been always considered to belong to the rector or to the owners of the land. A vicar has

(a) 2 & 3 W. 4, c. 100, s. 3.

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no common-law right to tithes; he is not like a rector, who is *primâ facie* entitled until another person shows a prior right. A vicar must show title. To support the claim in this case it was necessary to prove either an endowment, or usage amounting to evidence of endowment, of all tithes in the nature of small tithes. The effect of the evidence is, that occupiers of houses, and some occupiers of lands and houses, but not of lands only, have made uniform payments of small sums yearly to the vicar,—mere personal payments, under the denomination of “privy tithes.” They were called *privatæ decimæ* in the 26th of *Henry 8*; and the fair inference from the evidence is, that the payments still continued to the vicar are of the same nature. The receipts of the last vicar, produced at the hearing, were all expressed to be for “privy tithes,” which are mere personal tithes or oblations. They were called privy tithes in one of the terriers put in evidence by the Respondent.

The decree has proceeded on the assumption that “privy tithes” and *privatæ decimæ* are identical with small tithes or *decimæ minores*. Mr. Baron *Alderson* thought “privy tithes, in their ordinary meaning, would be the small or vicarial tithes(*b*); and that is the meaning,” he says, “in which *Blackstone* (*c*) uses the words.” The form of expression, “which are therefore generally called privy or small tithes,” used by *Blackstone* in his succinct statement of the distinction between a rector and a vicar, although sufficient to convey to the student an idea of the vicar’s right in contradistinction with the rector, was never intended to define privy or small tithes, or confound these different descriptions, or signify that they were synonymous or equivalent. In the same sentence, he says,

(*b*) 2 Y. & C. 167.

(*c*) Comm. vol. 1, p. 388.

“The greater or predial tithes being still reserved to the rector:” surely greater and predial tithes are not the same. *Blackstone* teaches the principles of our laws, but uses very inaccurate language. Privy tithes are expressly distinguished from small tithes in the Ecclesiastical Survey, which was put in evidence in this cause, and which in one part, showing the value of this vicarage, has, “*In libro suo comput. paschat. Privatarum decimarum;*” and in another part has these words, “*In minoribus decimis, viz. porcorum, anserum,*” &c. But inasmuch as this Ecclesiastical Survey distinctly mentions “oblations” as due to the vicar, his counsel in the Court below insisted that “privy tithes” could not, as the Appellants contended, be taken to mean oblations or offerings. The short answer to that argument is, that small tithes, “*decimæ minores,*” are also distinctly mentioned in that document, and for that very reason they cannot be taken as synonymous with privy tithes.

The whole question seems to turn on the construction of the words “privy” and “private” tithes. All parties admit that they are a species of small tithes; but the Respondent goes farther, and insists that they include all small tithes; while the Appellants submit that they are only personal tithes. Personal tithes are defined by the stat. 2 & 3 *Edw.* 6, c. 13, s. 7, and are ordered to be paid yearly at or before the feast of Easter. All tithes are divided by the common lawyers into *majores seu grossæ decimæ*, and *minores seu minutæ decimæ* (*d*). No one can contend that privy or private tithes are co-extensive with either branch of the division. The Appellants say they were money payments to the vicar in addition to the Easter offerings, and were paid by persons occupying

(*d*) Sir Sim. Degge, 2d Part, c. 1, p. 282. (Ellis ed.)

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houses within the parish, with or without lands. The evidence showed that some persons having lands did not pay them; and that others, having lands with houses, paid always the same amount, although the quantity of land in their occupation might have varied. Mr. Baron *Alderson* seemed to be of opinion that these payments were in the nature of compositions for small tithes; but that opinion was not supported by any part of the evidence, oral or documentary. There is no case in which privy tithes have been held to be small tithes, or compositions for small tithes; and in the Ecclesiastical Survey, the former description seems to be used in contradistinction to the latter.

It may be worth while to see how the words “privy” and “private” were used by the ancients. It will be found that “*privatus*” means a man’s own, particular, peculiar, proper; the same as the Greek word *ιδιος*. The critical dictionaries annex to it, *quod unius cujusque proprium; privum; ei oppositur publicum aut commune*. *Suetonius* has, “*privatus sumptus*.” *Petronius Arbiter* has, “*paupertatem nostram privatis quæstibus tentamus expellere*.” And *Horace* has, in the second Epistle of the first Book, “*privatas ut quærat opes*.” The word “*privus*” likewise means particular, proper, peculiar to oneself. *Martin*, in his *Philological Lexicon*, annexes to the word, “*quæ unius cujusque sunt*.” *Livy*, in the 43d chapter of Book 30, has, “*senatus consultum in hæc verba factum est, ut privos lapides silices, privasque verbenas secum ferrent*.” *Horace*, has in his first Epistle, “*quem ducet priva triremis*.” Neither “*privatus*” nor “*privus*” has been ever used to signify “small;” and as applicable to tithes, the word always used to express that description is, “*minores*,” or “*minutæ decimæ*.” In several

records and enrolments of leases in the midland counties, cotemporary with the Ecclesiastical Survey of 27 *Henry* 8, “privy” tithes are used in the sense of “personal” tithes; it is in that sense the expression is used in the Ecclesiastical Survey and in the terrier; and the searches made by the Appellants in a great number of vicarages establish the identity of the expressions in this case.

As to the *Berrington* Court Farm, occupied by the Appellant *Clee*; the render of the crops of the ridges and parcel of land on that farm to the vicar, or the money payment in lieu of the crops for a long series of years, as stated in *Clee*’s answer, was distinctly proved; as were also the assertion by the Respondent of his title to the ridges and parcel of land as owner, and to the money payment as a rent, and not tithe; and the ejectment brought by him against the tenant in possession, to recover the ridges and parcel of land: all which facts, the Appellants submit, are inconsistent with the claim of the Respondent to tithes of the *Berrington* Court Farm.

The evidence in the cause distinctly proved, and it was not disputed on the part of the Respondent, that all the small tithes of certain lands in the hamlets of *Tenbury* Town and *Tenbury* Foreign had been conveyed together with those lands from a very remote period. And it was proved that the dwelling-house and land occupied by the Appellant *Davis*, situate in *Tenbury* Town, formed part of the lands so conveyed together with the tithes thereof, and therefore not liable to the payment of small tithes to the vicar; and yet an account is decreed with costs as against *Davis* in respect of the last-mentioned dwelling-house and lands, as well as in respect of the farm and lands occupied by him in the township of *Berrington*.

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Even if the Appellants had not satisfactorily proved that the Respondent is not entitled to the tithes of any titheable matters in the township of *Berrington*, and if the Respondent had proved (which the Appellants submit he has not) that he is entitled to any tithes within that township, yet the effect of the evidence on the part of the Respondent tended to prove the existence of moduses in lieu of the tithes of the farms and lands occupied by the Appellants; that is, the payments stated in the pleadings to have been made under the denomination of privy tithes: and with such evidence the Court ought not to have decreed an account of tithes in kind.

If the House should not be of opinion that the bill ought to be dismissed, in that case the Appellants further submit that an issue or issues ought to have been directed; and also that the rector ought to have been made a party to the suit. A decree made in his absence, and without his having an opportunity to assert his rights, would not protect the Appellants from any claim by him in respect of the tithes, of which an account is decreed in favour of the Respondent.

Mr. *Maule* was heard on the same side.

Mr. *Boteler* and Mr. *Simpkinson* (with whom was Mr. *Bethell*), for the Respondent:—The vicar stands on his legal right to all the small tithes of the three hamlets, and to all the tithes, as well great as small, of the fourth, except perhaps the tithe of hay; in lieu of which he is entitled to a composition. That claim of right is supported by the evidence in the cause, both the ancient documents and the parol testimony. The payments made to the Respondent's predecessors by occupiers of lands in the three hamlets, in the name

of “privy tithes,” were payments of compositions for small tithes. The terms privy tithes are synonymous with small tithes, in the parish of *Tenbury* and in the whole county of *Worcester*. The argument for the Appellants, that “privy tithes” are money payments in the nature of personal tithes, oblations and offerings, is refuted by the very fact that, besides and above the payments of privy tithes, other payments, including personal tithes and offerings, have been always made to the vicar in the name of “Easter dues,” in every year: so that in practice in this very parish they are distinct payments. The admission by the Appellants that the payments of privy tithes were uniform in amount, shows that they were compositions for small tithes. *In libro suo computato*, are the words in the Ecclesiastical Survey. Pope *Nicholas’* Taxation, the *Nonæ* Rolls, and the Ecclesiastical Survey, all put in evidence by the Respondent, clearly support his claim. He did not make the improper rector a party to the suit, because he wanted nothing of the rector, who claims only the tithes of corn and grain in the three hamlets, and the Appellants insist that the small tithes belong to themselves or to their landlords.

In the old edition of *Jacob’s* Law Dictionary, “privy tithes” are taken to signify vicarial tithes; and *Tomlins* retains that description in his edition. *Blackstone*, in the first volume of his Commentaries, (p. 387), and after him Mr. *Eagle*, in his book, mention privy tithes and small tithes as meaning the same thing. And they are so mentioned indiscriminately in a great number of decided cases: *Ekins v. Dormer* (e), *Coe v. Mason* (f), *Hastings v. Goldwyer* (g), *Fleetwood v. Livesey* (h), *Dyde v. Kinch* (i),

(e) 3 Atk. 533.

(f) 1 Wood, 41.

(g) 1 Wood, 70.

(h) Id. 93.

(i) 1 Wood, 148.

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Walter v. Flint (j), *Allen v. Critcheley* (k), *Warner v. Fisher* (l), *Lord Stawel v. Atkins* (m), and *Boulter v. Thackwell* (n). These cases leave no room to doubt that generally privy tithes mean small tithes; and indeed, in common acceptation, “privy” and “small” are used synonymously. It would be easy to multiply quotations from ancient authors to show that meaning, as well as the signification contended for by the Appellants. The passage cited from *Livy* bears that meaning. The *priva triremis* (his own galley), in the 93d line of the first Epistle of *Horace*, was used in contradistinction to *conducto navigio*, in the preceding line. In the fifth Satire of the second Book we find this passage, teaching the secret of growing rich:—

“Accipe qua ratione queas ditescere. Turdus
Sive aliud *privum* dabitur tibi, devolet illuc
Res ubi magna nitet domino sene.”

There *privum* can have no other meaning than small.

The evidence produced in the cause by the Appellants themselves, confirms the case made by the Respondent; the receipts produced by them from the former vicar show that they were given for monies paid for small tithes, in the name of “privy tithes.” The title-deeds produced by them relating to the impropriate rectory, restrict the title of the impropriate rectors to the tithes of corn and grain and hay; the only instance, in which any other tithes were in these deeds expressed to be conveyed, was where the tithes conveyed were the tithes of the parsonage or glebe lands belonging to the rectory. No cause or origin has been shown, or even suggested, for the

(j) 3 Wood, 293.

(k) 4 Wood, 257.

(l) Id. 289.

(m) 4 Wood, 459.

(n) Id. 530.

payments made to the vicar throughout the three hamlets, except the right he has to the small tithes of these hamlets.

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Mr. *Pemberton* replied:—The cases referred to, do not decide that privy tithes are small tithes. The quotation from *Horace* establishes the meaning sought to be affixed to the word *privus* by the Appellants. *Privum* there means peculiar, particular, and has been so understood in the popular translation of *Horace*, by Mr. *Francis*, who translates it “dainty.”

The *Lord Chancellor*:—My Lords, in this case of *Clee and Others v. Hall*, it appears to me particularly important to attend to the defences set up in the answers of the Appellants. They all claim title in themselves, or in those under whom they hold their lands, to the tithes demanded by the vicar; and they all, except *Clee, George, and Blacklock*, admit payment of small annual sums to the vicar, under the name of privy tithes. Against such defences it is certainly necessary for the vicar to show his title to the tithes claimed; but if he succeed in so doing, it is not competent for the defendants, upon such pretences as they have alleged, to set up moduses or compositions. The defendants have totally failed in showing any title to those tithes in themselves, or in those whose lands they hold. There seems to be some reason for supposing that some of the lands, held by *Roberts, Powles, George, Davis, and Price*, were formerly part of the rectory; but they have not proved that the small tithes in question were granted with the lands, or have since been conveyed with them. It is, indeed, stated in the Appellants' case, that one

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of the houses in *Tenbury* Town, comprised in one of the deeds proved in the cause, was traced to the defendant *Davis*; but I do not find any evidence that any of the lands occupied by any of the defendants had been conveyed with the tithes in question. All the defendants, therefore, have failed in this their principal defence, namely, title in themselves to the tithes in dispute.

But it is still open to the Appellants to insist that the vicar has failed in proving any title in himself. No endowment being produced, the vicar is at liberty to establish his title by other evidence. That there was a vicarage endowed before the year 1291, appears from Pope *Nicholas's* Taxation. The tenth of the church was taxed at two marks, and the tenth of the vicarage at one mark. The Ecclesiastical Survey is not very intelligible by itself; but it becomes less so, when it is considered that the vicar appears to have all the tithes of a district called *Sutton*. When, therefore, the Ecclesiastical Survey speaks, in one place, of tithes of sheaves and hay, and in another, of lesser tithes, to wit, pigs, geese, *et cetera*, it may be referring altogether to *Sutton*; otherwise it might be inferred that the privy tithes spoken of were something different from the lesser tithes. This establishes the fact that the vicar at that time was entitled to some endowment under the name of "privy tithes."

The Parliamentary Survey and the first Terrier afford no information, but the second Terrier is very important. It states that the vicarage has one portion of tithes from *Sutton*, and privy tithes from the rest of the parish. The fact that the vicarage was endowed with some description of tithes from the parish generally is, I think, from these documents sufficiently established. Of the payment of small sums, as for

privy tithes, there is no dispute ; the receipts go back as early as 1763, and in 1784 the payment is described as a modus for the small tithes. The same occurs in 1796 ; but in general the term “ privy tithes ” is used.

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As these small tithes must have originally formed a part of the rectory, and as the question is whether they were at an early period separated from the rectory as an endowment of the vicarage, it is material to ascertain whether they have been treated as still belonging to the rectory. The earlier documents, such as the grant to *Andrews* and *Temple*, in the 35th of *Henry* the 8th, prove nothing, as general terms only are used, such as “ all tithes to the rectory belonging ; ” but in subsequent conveyances, such as the fines in the 26th of *Charles* 2 and the 2d of *Anne*, and the recovery in the 11th of *Anne*, there is a description of the advowson of the church of *Tenbury*, and all and all manner of tithes and sheaves, grain and hay ; and there is no evidence that any small tithes from any of these lands were ever claimed by the persons entitled to the rectory.

It is true that conveyances were produced from *Millward*, *Corbett*, and *Hayle*, who claimed under *Andrews* and *Temple*, of particular lands, with all tithes, as well great as small, as are within the premises ; but from the preceding conveyance of the 13th of *April*, in the 19th of *James*, there is good reason for believing that these lands were parcel of the glebe, which may well be supposed to have been excepted from the endowment of the vicarage ; and these form no part of the lands of the defendants.

These ancient documents, taken by themselves, would constitute strong evidence of the vicarage being

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endowed with the small tithes generally, by proving that the vicar was entitled to some tithes called "privy tithes," and that the small tithes had not (except in some few instances, not in question in this cause) been conveyed with the rectory as tithes; and the parol testimony strongly confirms these deductions from the documentary evidence, as it proves the payment of these sums called "privy tithes," and that they are different from Easter offerings; and the small tithes have never been paid to the owners of the great tithes.

As to the meaning of the term "privy tithes," many authorities and instances were produced to show that the term was often used as synonymous with small tithes; proving, I think, satisfactorily, that they cannot be understood to mean personal tithes, which is the meaning contended for by the Appellants; and there is parol evidence that the term is understood in the district in which these lands are situated, to mean small tithes. It is true, that as to some of the defendants, there is no evidence of any payment of privy tithes having been made by them; but the question is, whether there be sufficient secondary evidence of the vicarage having been endowed with the small tithes: because, if there be sufficient evidence of such endowment, the vicar's right will be established as against all lands as to which no particular discharge is proved, although no small tithes have ever been paid for such lands. The cases of *Kennicot v. Watson*(o), and *Masters v. Fletcher* (p), establish this proposition. Upon the whole, therefore, I think the decree of the Court of Exchequer right, and that it should be affirmed, with costs.

(o) 2 Price, 250; 3 E. & Y. 690.

(p) Younge, 25.

It was ordered accordingly, that the appeal of *Clee and Others v. Hall* be dismissed; and that the decree appealed from be affirmed, with costs.

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The further hearing of the two appeals of *Godson and Others*, and *Wheeler and Others*, v. *Hall*, being appointed for this day (q) :

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Mr. *Kindersley*, Mr. *Swanston*, and Mr. *Godson*, attended for the Appellants; Mr. *Boteler* and Mr. *Bethell*, for the Respondent.

The counsel for the Appellants admitted that the question in these appeals on the merits was the same as that which was disposed of in *Clee and Others v. Hall*, and that the principle of the decision in that case governed these; but they showed that several of the Appellants in the case of *Godson and Others v. Hall* held lands which were either glebe lands, or were conveyed, with all the tithes, by some of the deeds produced in the cause.

The *Lord Chancellor* :—Some of these Appellants had a particular ground of defence, which was not brought before the Court. It might be in their counsel's brief, but the Court did not know anything of it. At present it appears that the land of *Barnes*, who holds under *Pembroke College*, is altogether withdrawn from the suit; and so also are *Russell's* four acres, which are part of the glebe lands; and all *Cooke's*, which are also a piece of the glebe. It appears to me that these Appellants set up a good defence to the suit, and that they stated that from the beginning,

(q) *Vide supra*, p. 549.

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and that the bill ought to be dismissed with costs as to them ; but as they did not ask for the opinion of the Court below on this case, their having to come here is their own fault, and so the costs of the appeal must not be given to them.

After some further discussion between counsel as to the situation of the lands occupied by other Appellants, and the evidence of their exemption from tithes :

The *Lord Chancellor* :—The right course will be as to some of the parties—those who are not proved to be in possession of the lands which form part of the premises comprised in the conveyances embracing the tithes—that, as to them, the decree must be affirmed with costs. With respect to the defendants *Cooke* and *Barnes*, the bill must be dismissed ; and I think that, as they set up a complete answer to the suit, the bill must be, as against them, dismissed with costs. There was not any good case as against them ; and to that case, such as it was, they stated a good defence. With regard to the costs of the appeal, those parties who succeeded in altering the decree must be exempted from the payment of those costs. With respect to those who hold glebe lands, the decree must be altered, so far as they are concerned, by excluding from the effect of the decree that part of their lands which is conveyed with the great and small tithes. Two parties have succeeded altogether in withdrawing their lands from the effect of the decree, and those who have so succeeded must not be called on to pay costs, while those who have not so succeeded must pay costs ; and those who have succeeded in showing their lands not to be liable must have the costs of the suit below.

The order made in the appeal of *Godson and Others v. Hall*, was, that the decree complained of, as to the Appellants *Cooke* and *Barnes*, be reversed, and that the Respondent's bill as to them be

dismissed, with costs : that the said decree as to the Appellants *Russell*, *Smith*, and *Benbow*, be in part reversed, and that the Respondent's bill as to them be in part dismissed, with costs ; that is to say, as to *Russell*, in so far as the bill and decree relate to four acres and 27 perches of his land, being part of the parsonage lands purchased by *Penry Williams*, Esq., and as to *Smith*, so far as the bill and decree relate to one acre and three quarters of his lands, being also parcel of the said parsonage lands, and as to *Benbow*, in so far as the bill and decree relate to a dwelling-house and buildings and 11 acres of land held by *Benbow* under *Pembroke College* : That the decree as to these three Appellants in respect of all other houses and lands in their respective occupation be affirmed ; and that, as to all the rest of the Appellants, except those five above named, the appeal be dismissed, and the decree affirmed, with costs.—72 *Lords' Journals* (for 1840), p. 598.

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After some discussion between Counsel on the claims of exemption by some of the parties Appellants in the case of *Wheeler and Others v. Hall* :

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The *Lord Chancellor* :—As to the case of *Wheeler and Others v. Hall*, that is a case where the defendants merely denied the vicar's title, but did not make any title in themselves. The parties here are in the same situation as the parties in *Clee and Others v. Hall*, and must have the same rule applied to them.

It was ordered accordingly, that the appeal of *Wheeler and Others v. Hall* be dismissed, and the decree complained of be affirmed, with costs.

1837 : ALEXANDER DONALDSON - - - - - *Appellant.*
June 2.

1840 : Misses JANE HALDANE and ISABELLA }
August 3. HALDANE - - - - - } *Respondents.*

*Attorney.
His Duty
and Liability.*

As attorney, who was the ordinary attorney for a borrower, he acted in the matter of a particular loan for the lender, but did not make any charge against the lender for his services. The security he took was not sufficient.—HELD, that he was properly charged as an attorney acting on the retainer and employment of the lender, and was in that character liable to an action for damages for the loss suffered through the insufficiency of the security.

After the death of the lender, two of his sisters, by an arrangement with the rest of the family, who were the legatees of the lender, became possessed of the security, and applied to the attorney to do what was necessary. The means taken to secure the repayment of the loan, on this continuation of it, were insufficient.—HELD, that as representing the interest of the deceased, and on their own account, the sisters were entitled to compensation from the attorney.

THE Appellant in this case (the defendant in the suit below) was a writer to the signet, and had been employed in that capacity as attorney for Mr. *Henry Haldane*, now deceased. The summons in the suit stated that the late Mr. *Henry Haldane*, the brother of the pursuers, being in the year 1823 desirous of investing a sum of 2,000*l.* on heritable security, consulted with the Appellant, and employed him to look out for a safe and profitable investment for the said sum : that *Archibald Dunlop*, distiller at *Haddington*, for whom the Appellant also acted as agent, had, in the year 1815, obtained from the magistrates and town council of the burgh of *Haddington*, as representing the community thereof, a lease for twice

99 years of a field belonging to the said burgh, on which *Dunlop* had subsequently erected a distillery and other buildings: that in 1818 *Dunlop* had borrowed a sum of 2,000*l.* from an individual of the name of *Cunningham*, on the security of an assignation to the lease above mentioned: that, in the course of the communications betwixt *Haldane* and the Appellant, in regard to the investment of the 2,000*l.*, the Appellant advised *Haldane*, that a transference in his favour of the assignment of the lease would form a valid and effectual real security to him, the said *Henry Haldane*, over the subjects in question: that *Haldane* did, in consequence, professionally employ the Appellant to invest the 2,000*l.* on the said security, as being a good and effectual real security: that the Appellant accepted this employment, and prepared a transference accordingly, as security for 2,000*l.* paid over by *Haldane* to *Cunningham*, the previous holder of the security: that it was the duty of the Appellant to take steps for having the right in the lease so conveyed made an effectual real right in the person of *Haldane*, so as to be preferable to any other rights subsequently granted or acquired over the property; and this, either by intimating the same to the landlords, and at the same time taking measures for putting *Haldane* in the possession, natural or civil, of the said subjects, or by such other steps as were required by law; but that the defender, in violation of his professional duty, took no steps, or at least no sufficient steps, for this purpose, and the said assignation to the lease remained a merely personal and incomplete right: that *Haldane* died in *December* 1826, and his interest in the loan of 2,000*l.*, and the security, became vested in the Respondents: that the Respondents consulted and

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advised with the said Appellant in relation to the said sum, and the mode in which they should proceed regarding it: that, antecedently to this period, the subjects in question, held, as above mentioned, by *Dunlop*, had been disposed by way of feu by the magistrates of *Haddington*, by feu-disposition, in *July* 1826, to *Dunlop*, who thereon became absolute proprietor of the same, and was regularly infeft thereon: that the Respondents were ready to call up from *Dunlop* the sum of 2,000*l.*, but that the Appellant, who still acted as agent for *Dunlop*, advised the Respondents that it would be expedient and profitable for them to allow the money to remain with *Dunlop*; and, instead of the assignment of the lease, to take a heritable bond and disposition in security over the property, to be granted by the said *Archibald Dunlop*, as proprietor thereof: that the Appellant did not then, or at any other time, inform the pursuers of the defective nature of the original security, but represented that the money would be safely invested on a heritable bond and disposition, granted as aforesaid by the said *Archibald Dunlop*: that the Respondents did, in consequence, professionally employ the Appellant to invest the 2,000 *l.* on the said security, as being a good and effectual real security: that the defender accepted this professional employment, and prepared a bond and disposition in security over the property, in favour of the Respondents, which bond was subscribed by *Dunlop* on 4th *February* 1828, and on which infeftment was passed by the Appellant in favour of the Respondents on the 5th, and recorded on the 8th, of the said month: that in consequence of the bond having been granted in the Respondents' favour, the assignment of the lease was given up to *Dunlop*

and cancelled: that in this transaction the Respondents relied on the professional skill and diligence of the Appellant in making the bond and infestment a good and sufficient security; and trusted that they thereby held an effectual right over the said subjects, preferable to all other real rights whatever: that the Respondents have recently discovered that the said security was not a good and sufficient heritable security, or such as any professional person of ordinary prudence would, in the fair discharge of his duty, have accepted on behalf of his employers; and more especially, there had been granted by *Dunlop*, over the said subjects, certain other heritable bonds and dispositions, or other real rights, which were prior in date to that in favour of the Respondents, and preferable thereto; and, in particular, a bond and disposition in security, in favour of the *British Linen Company Bank*, in security of a loan of 15,000*l.*, dated 30th *August* 1826, and whereon infestment followed on the 4th, and was recorded the 6th, *September* of the same year. And also another bond and disposition in security, granted in favour of *William Dunlop*, merchant in *Edinburgh*, and *John Tweedie*, writer to the signet, for relief to them of sums amounting to 8,500*l.* of principal, besides other sums of interest and premiums of insurance, dated 10th *October* 1826, and followed by infestment, dated 20th *October*, and recorded 28th *November*, of the said year: that, at the time of preparing the above-mentioned bond in favour of the Respondents, the said Appellant, in violation of his professional duty, omitted to search the records in order to discover prior incumbrances: that the value of the subjects in question is so much exhausted by the prior and preferable securities, as to leave nothing for the security held by the Respondents,

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and, in fact, not to be sufficient even to satisfy the prior and preferable rights.—The summons then alleged a loss of the principal and interest of the sum lent; and, after charging, on account of the Appellant's connexion with *Dunlop*, more than merely incautions and negligent conduct on the part of the Appellant, prayed that he might be decreed to make good the loss so sustained, with costs.

The defences for the Appellant in the Court below consisted of a general denial of liability in law and in fact; and he alleged that when the change in *Dunlop's* tenure of the property from leasehold to freehold was made, it was matter of notoriety in *Haddington*, where Mr. *Haldane* resided, was well known to himself, and was frequently the subject of conversation between him and Mr. *Dunlop*: that, at Mr. *Dunlop's* request, the Appellant then intimated to Mr. *Haldane* that the 2,000*l.* owing to him would then be paid, unless he wished the money to remain with Mr. *Dunlop* on his personal security. The Appellant, at the same time, stated to Mr. *Haldane* that, according to the opinion he entertained, Mr. *Dunlop's* right of lease had merged in his feudal right, and was incapable of affording a real security. Mr. *Haldane* stated that he was quite satisfied with Mr. *Dunlop's* personal security, and felt obliged by his retaining the money; for which, as was then thought, so secure an investment could not easily have been obtained.

After Mr. *H. Haldane's* death, the Appellant alleged that he wrote the following letter to Mr. *John Haldane*, who had then the management of the Respondents' affairs:—

“ I think you will find the enclosed a correct copy of Mr. *Dunlop's* bond to your late brother. In explanation of what I said yesterday, I may mention

that the assignation never was intimated to the magistrates, and that, in point of fact, the lease was virtually renounced three months before your brother's death, by Mr. *Dunlop's* becoming feudal proprietor of the ground on which the distillery is built. Mr. *D.* was very anxious to change the tenure by which he held this property, and applied to the town council to give him a feu-right in place of a lease, offering 20 *l.* annually in addition. This was evidently beneficial for the town, but they could not enter into the transaction without exposing the ground for sale. It was then bought by Mr. *Todrick* for Mr. *Dunlop*, and afterwards transferred to the latter, and he was infeft in *August* 1826. I mentioned to your brother that, in my opinion, he no longer held any security beyond Mr. *Dunlop's* personal obligation, and that Mr. *D.* would pay him up the money at the ensuing Martinmas, if he wished it; but he said that he was quite satisfied with Mr. *D.'s* own security. Under the circumstances now stated, I do not think this can be viewed in any other light than a personal bond."

He also alleged that, in the transaction with *Dunlop*, he was the attorney for that person, and not for Mr. *H. Haldane*, against whom he had never made any charge for the labour then performed: and finally, he denied the title of the Respondents to claim as the representatives of Mr. *H. Haldane*; for he alleged that that gentleman left a will made in the *English* form, which would not have passed this security, if it had been a real security, to the Respondents, and that they took it not under the terms of that will, but by an arrangement in the family, which proceeded on the express ground of this being not a real but a personal security.

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The cause was heard before Lord *Fallerton* as Lord Ordinary, and he made a decree (afterwards confirmed by the Court of Session) declaring the Appellant liable. The present was an appeal against that decree.

Sir *W. Follett* and Dr. *Lushington*, for the Appellant :—The conveyance was in the first instance correctly executed ; and beyond that the Appellant undertook no responsibility. But if intimation to the landlord of the security granted upon the lease was required, that had been sufficiently complied with by the notice given to the magistrates upon the execution of the security to *Cunningham*, and all the rights which *Cunningham* possessed were completely transferred to *Haldane* upon the execution of the assignment of the lease. *Haldane*, in fact, to all intents and purposes, stood in the situation of *Cunningham*, entitled to his rights and subject to his liabilities. But, strictly speaking, the Appellant has a right to deny his employment by *Haldane*, and therefore to deny his liability altogether. He was the law agent of the grantor and not of the grantee, and neither charged nor received any compensation for his trouble for the latter. Then, again, the fact that the security was not a real but a personal security, was known to Mr. *Henry Haldane* in his lifetime, and he expressed himself as contented with the personal security of Mr. *Dunlop*. In order to recover from the Appellant compensation for any alleged loss, he ought to have given notice to the Appellant of his dissatisfaction with the security, so that the agent might have had the opportunity of obtaining relief by taking the subject off his client's hands ; *Hunter v. Fleming & Strang*, 11 December 1829. The Respondents can

stand in no better situation than Mr. *Haldane*, from whom they claim to derive title ; and as he could not have recovered against the Appellant, neither can they, but must be bound by his acquiescence. But in truth the Respondents here do not represent Mr. *Haldane*, for he did not make them devisees of this security : they came into possession of it by a family arrangement made among the survivors of Mr. *Haldane*, and they are therefore not entitled to claim damages for a loss that happened, if at all, to his estate, which in no manner whatever do they legally represent : so that taken either way they must fail. If they represent Mr. *Haldane*, they are concluded by his acts, and cannot recover : if they do not represent him, they have no title to complain of a loss which happened in his lifetime and to his estate.

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The *Attorney-general* and Mr. *Hope Maclean*, for the Respondents :—The summons here properly charges the Appellant with having been retained as attorney for Mr. *Haldane*, and that he accepted that employment. If so, his liability to answer for the skilful and careful discharge of his duties is too clear to be doubted. That principle was fully and clearly stated in this House in *Stephenson v. Rowand* (b) ; and the *Scotch* cases are all in accordance with it ; *Struthers v. Lang* (c), and *Brown v. Cuthill* (d). Then comes the question whether Mr. *H. Haldane* was aware of the fact that the security was only a personal security, and was content that it should be so. There is no direct proof that he was ; and whatever he may have said in a general way as to his being satisfied with

(b) 2 Dow & Clark, 104 ; 4 Wils. & Sh. 177.

(c) Fac. Coll. 2 Feb. 1826, and 2 Wils. & Sh. 563.

(d) 4 Murr. 474.

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the security, was, no doubt, a statement made by him on the faith of the representations and the advice given him by the Appellant. There is, therefore, nothing which can affect the right of the Respondents. The case was considered quite clear in the Court below, the judgment in which proceeded on a principle distinctly laid down by this House.

Sir *W. Follett*, in reply :—The employment of the attorney must be an employment for profit ; a mere gratuitous acting, where in fact the attorney was the attorney of the other party, will not make him liable. Besides, it is plain here that he did what was at the time satisfactory to Mr. *Haldane*, who was aware of the nature of the security, and was content with it. Those who take under Mr. *Haldane* cannot now turn round and impose on the Appellant what that gentleman had never thought of imposing.

1840 :
 August 3.

The *Lord Chancellor* :—The first question in this case is, whether the Appellant was liable, in an action for damages in respect of certain transactions which took place in 1823, when money was first advanced by a client of the Appellant, and, as it is alleged, under his advice : and the second is, whether he is liable in respect of the transaction of 1827, when the loan was continued by the sisters of the former client : those ladies, as it is stated, also placing themselves under the advice of the Appellant. The security for the loan ought to have been on certain leases of land demised to the borrower, and an assignment of the lease was obtained ; but in order to complete it, there should have been notice of the assignment given to the lessors. That was not done ; and that is one of the grounds of the

action. It is said that the respondents do not represent the original lender, *H. Haldane*; and therefore that they cannot claim here compensation for a loss suffered by that person in his lifetime. I am not of opinion with the Appellant on that point. In *October* 1827 a letter was written by the Appellant to some of the Respondents' family, to the effect that the Appellant had, after the change of *Dunlop's* tenure of the property in 1826, informed Mr. *H. Haldane* that the security he had received had become nothing more than a personal bond; and that Mr. *H. Haldane* had then stated to the Appellant that he was satisfied with Mr. *Dunlop's* personal security. If that was so, it was most probably under the advice of the Appellant; and if the advice was wrong, the money was lost by his mistake, and he must be held responsible for it. The ladies were willing to lend, or rather to continue to lend, the money at interest, if they could get a good security for it. Now it appears that no means were taken by the Appellant to effect that object, independently of obtaining the personal security of the owner of the property; and from the want of care in this respect the loss has arisen. It therefore appears to me that I ought to advise your Lordships to affirm the interlocutor; but I do not think that the circumstances require that it should be affirmed with costs.

Lord *Brougham* :—I quite agree with my noble and learned friend. It is impossible to get over these letters, in which the Appellant appears to act for the Misses *Haldane* after their brother's death. It appears that he had not made any charge, and his conduct in volunteering his services does incline one to think that the liability he incurred in point of law is somewhat hard upon him; but still I cannot doubt that

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he is liable. There have however, in this case, been unwarranted attacks on the character of a professional gentleman ; and that circumstance induces me to agree that costs ought not to be given.

Interlocutor affirmed, without costs.

1840 :

Aug. 3. 6, 7.

PETER DIGGES LA TOUCHE - - - - *Appellant.*

The Right Hon. GEORGE CHARLES, EARL } *Respondent.*
OF LUCAN - - - - - }

Creditors.
Trust Deed.
Cestui que
Trust.

THE execution of a trust deed for (among other things) the payment of creditors, does not constitute one of the creditors, who became so after the execution of the deed, and was not a party to it, a *cestui que* trust, entitled to call on the trustee to execute the trusts of the deed.

A. executed a trust deed, appointing B. trustee for certain purposes therein stated, one of which was for the payment of creditors, and another was to raise a sum of money by way of mortgage, in order to satisfy a claim for rent due in respect of A.'s lands, then about to be enforced by ejectment. B. obtained from C. an advance of money with which he satisfied this claim. B. afterwards gave to C. a letter, written subsequently to, but dated before the day of the advance ; in which, appearing to ask for the advance, he said, " I will consider such advance as raised by me under the power given me ; and will, whenever you please, exercise that power, by securing such advance in the best manner I am empowered by the deed." No security was ever executed by B.—HELD, that C. did not stand in the situation of a *cestui que* trust under the deed, and could not maintain a bill in equity, calling on B. to execute the trust of the deed.

SIR NEAL O'DONEL the elder, baronet, deceased, being seised of certain lands in the county of *Mayo*, known by the name of the *Newport* freehold estate, for a term of three lives renewable for ever, at the yearly rent of 980*l.* of the late currency of *Ireland*, and being also seised in fee of certain other lands in the counties of *Mayo* and *Galway*, by deeds of lease and release, the release bearing date the 10th day of

October 1798, conveyed these several estates, subject to certain annuities, to the use of himself for life, with remainders to his first and second sons, and their sons; and on failure of them, to *Neal O'Donel*, the settlor's third son, for life, with remainder to his first and every other son in tail male, with divers remainders over. And by said deed a sum of 10,000*l.* was charged on said estates for any daughter of *Hugh O'Donel*, one of the settlor's sons, and a term of 500 years was thereby created for securing the charge: and Sir *Neal* the elder reserved to himself a power to charge the estates with a sum of 14,000*l.* (and which power he afterwards executed); and a schedule was annexed to said deed, containing the several sums due by Sir *Neal O'Donel*, bart., and chargeable upon the estates.

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Hugh O'Donel died in the lifetime of his father, without any male issue, leaving an only daughter, who survived him, and became entitled to the benefit of the sum of 10,000*l.*, which was secured by the trust term; and the other son having also died without issue, and Sir *Neal O'Donel* the elder having died in the year 1810, *Neal O'Donel* the younger thereupon became Sir *Neal O'Donel*, baronet, and entered into the receipt of the rents and profits of the said estates under the limitations of the settlement, subject to the charges of 10,000*l.* and of 14,000*l.*, and to the scheduled debts.

The Marquis of *Sligo* being entitled to the rent and reversion of the *Newport* freehold estate, brought an ejectment in Easter term 1825, for nonpayment of the rent; and Sir *Neal O'Donel* having given a consent for judgment in the ejectment suit, afterwards, on the 10th *November* in the same year, exhibited his bill of complaint in the Court of Chancery of *Ireland*, against the Marquis of *Sligo* and others, praying that

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he might be at liberty to redeem the premises upon payment of the rent then justly due and owing to said Marquis of *Sligo*.

Sir *Neal O'Donel* being so indebted to the Marquis for rent, and to several other persons in large sums of money for interest then due on the incumbrances comprised in the schedule to the deed of the 10th of *October* 1798, and on the other incumbrances created by that deed, and being also largely indebted on his own account, in the month of *October* of the said year 1826 gave his solicitor, *William Furlong*, instructions to prepare a deed, vesting his interest during his life in the said several estates in a trustee or trustees, for the purpose of raising a sum of money sufficient to discharge the arrears of rent and the other demands to which he was liable, and also to charge the estates with annuities for the necessary support of himself and family.

In the month of *December* of said year, or in the beginning of *January* 1826, while the trust deed was being prepared, several overtures (according to the statement of the Appellant) were made to Sir *Neal O'Donel* on the part of the Respondent, then Lord *Bingham*, who had declared himself a candidate for the representation in Parliament of the county of *Mayo* at the election which was then about to take place, for his support and influence; and with a view to enable the Respondent to use such influence to the best advantage, it was proposed that he should be appointed a trustee in conjunction with the Appellant in the trust deed; the Respondent and his friends undertaking to procure a loan of money sufficient to relieve Sir *Neal O'Donel* from his embarrassments, and more particularly to enable him to lodge in Court the rent and costs claimed by Lord *Sligo*. For this purpose nego-

tiations were carried on between the Respondent and those acting for him, and Sir *Neal O'Donel* and his friends, to which the Appellant was neither party nor privy; but such treaty having been broken off, an indenture, bearing date the 13th day of *February* 1826, was made between Sir *Neal O'Donel*, of the one part, and the Appellant of the other part; whereby, after reciting that Sir *Neal O'Donel* was tenant for life of the said estates, subject to the rent payable to the Marquis of *Sligo*, and to the several debts and incumbrances specified in the first schedule to the deed annexed, on which a considerable arrear of interest had been suffered to accrue due, and being indebted to the several persons and to the respective amounts in the second schedule thereunto annexed specified, had proposed to vest said estates in the Appellant, in trust for the uses and purposes in the deed set forth; and he, Sir *Neal O'Donel* the younger, had therefore conveyed unto the Appellant, and to his heirs and assigns, the *Newport* freehold estate, then held under the Marquis of *Sligo*, subject to the rent of 980 *l.*, and the *Cong* and *Newport* fee-simple estates; to hold the same for the life of Sir *Neal O'Donel* the younger, “ Upon trust, in the first place, thereout to retain and reimburse himself or themselves, all and every sum and sums of money advanced, or to be advanced, by him or them, out of his or their own monies, in part execution of the trusts hereby reposed, together with legal interest thereon; and also all costs, &c. incurred in preparing these presents, or in any way relating thereto, or in performance of the trusts thereof, &c.; and then in the payment and satisfaction of all arrears of quit rents, chief and other rents, or rentcharges, now due or to grow due thereout, and all costs incurred or to be incurred in respect thereof. And

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upon this further trust, that the said *Peter Digges La Touche*, or such other trustee or trustees as aforesaid, shall be at liberty (if he or they shall deem it expedient so to do) to raise, by way of mortgage, annuity, rentcharge, or other disposition of the said manors, towns, lands, tenements, hereditaments and premises, or any part or parts thereof, for the life of the said Sir *Neal O'Donel*, as they may find convenient or practicable, any sum or sums of money not exceeding in the whole the sum of 10,000 *l.*; the same to be applied in payment of the arrears of rents or of the interest of the incumbrances affecting the said estates in said first schedule mentioned; and of the interest of any other subsisting and valid debt or incumbrance now affecting them, or any of them, prior to the life estate therein of the said Sir *Neal O'Donel*: and in the next place, in payment of the several debts of the said Sir *Neal O'Donel* in the said second schedule mentioned, and of any other *bond fide* debt due at the day of the date of these presents by the said Sir *Neal*, in such order of priority or in such other manner as said trustee or trustees may think fit. And in case of all or any part of said 10,000 *l.* being so raised, then that the said *Peter Digges La Touche*, and such new trustee or trustees as may be appointed, may, yearly and every year, pay and advance such sum or sums of money as may be necessary to pay the sum or sums so to be raised, whether in reduction of the principal or the interest thereof, or in payment of any annuity or rentcharge to be granted for any such sum or sums, and also to defray the expenses of effecting one or more policy or policies of insurance for the said sum or sums of money, in case any such insurance shall be deemed necessary, and shall be effected upon the life of the said Sir *Neal O'Donel*;

and also to pay annual premiums or sums which shall from time to time be necessary for continuing the same; and in the next place, and until the full sum of 10,000 *l.* shall have been raised as aforesaid, or the trusts as to said sum shall have been fully satisfied, to retain out of the rents, issues and profits of said lands and premises any annual sum or sums of money which the said *Peter Digges La Touche*, or such new trustee or trustees, may think fit, not exceeding 20 *l. per cent. per annum* on said sum of 10,000 *l.*, or on so much thereof as shall not have been so raised, and to pay and apply such annual sum or sums towards the execution of the trusts hereinbefore declared with respect to said sum of 10,000 *l.*, or such of them as the said *Peter Digges La Touche*, or such new trustee, shall consider to be most expedient, either in respect of the incumbrances affecting said estates, or to the debts of the said Sir *Neal O'Donel*; and in the next place, out of the said rents, &c. to pay the annual interest of the debts, &c. affecting the said estates in the first schedule mentioned, and the interest of any other valid and subsisting incumbrance or incumbrances affecting the same, prior to the life estate of the said Sir *Neal O'Donel*, as the same shall accrue due, which he shall, as aforesaid, acknowledge in writing to be so: and, in the next place, thereout to pay the annual interest of the sum of 3,500 *l.* now vested in *Everard William Bouverie*, esq. and *Charlotte* his wife, and particularly mentioned in the said second schedule hereunto annexed; and also to pay the annual premium on any policy or policies of insurance which have been or shall be effected, on the life of the said Sir *Neal O'Donel*, to further secure said sum of 3,500 *l.*; and also to pay the annual interest on such of the other debts or sums, in said second

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schedule mentioned, as are or shall be payable with interest ; and also the annual premium or premiums on any policy or policies of insurance which have been or shall be effected on the life of the said Sir *Neal O'Donel*, in respect thereto, or to any of them ; and in the next place, out of said rents, issues and profits, to pay unto Lady *Catherine O'Donel*, the wife of the said Sir *Neal O'Donel*, for her accruing pin-money, and for her sole and separate use, the yearly sum of 500 *l.* ; and also to pay unto the said Lady *Catherine O'Donel*, towards the support of a suitable establishment for herself and family, the further yearly sum of 500 *l.* ; and also to pay unto the said Lady *Catherine O'Donel*, towards the maintenance, clothing and education of the daughters of the said Sir *Neal* and said Lady *Catherine O'Donel*, the further yearly sum of 500 *l.* ; the said three several yearly sums of 500 *l.* to commence from the 5th day of *January* last, and to be paid for the purposes aforesaid by quarterly payments, the first quarterly payments thereof to be made on the 5th day of *April* next ; in the next place, to pay for the use of *Hugh O'Donel* and *Richard O'Donel*, the first and second sons of the said Sir *Neal O'Donel*, the yearly sum of 300 *l.* ; that is to say, 200 *l.* a year for the said *Hugh* during his minority, and 100 *l.* a year for the said *Richard*, until the said Sir *Neal O'Donel* shall by writing under his hand direct said trustee or trustees to apply said last-mentioned sums of 200 *l.* and 100 *l.* in any other manner, and from thence said sums of 200 *l.* and 100 *l.* to be applied as said Sir *Neal* shall by such writing direct ; said sums of 200 *l.* and 100 *l.* a year to be paid quarterly, on the days hereinbefore mentioned for making said quarterly payments of said three several sums of 500 *l.* ; and in the next place, to retain for the use of the said *Peter*

Digges La Touche, or of such other trustee or trustees, as remuneration for his or their trouble and services in carrying the trusts hereby reposed in him and them into execution, the yearly sum of 200 *l.*; the same to be paid and payable by half-yearly payments, and to commence from the 5th day of *January* last; in the next place, to pay unto the said Sir *Neal O'Donel*, for his own use, the yearly sum of 500 *l.* during his life, by half-yearly payments; the first payment thereof to be made on the 5th day of *July* next ensuing the date of these presents; in the next place, to pay and apply to and for the use of the said Sir *Neal O'Donel*, in such manner and payable at such times as he shall by any writing or writings under his hand direct and appoint, any further sum or sums not exceeding the sum of 500 *l.* a year; the said last-mentioned 500 *l.* to be payable only from the time of such appointment, and in case there shall be a sufficient sum remaining of the annual rents of said lands and premises after making the several other annual payments thereout hereinbefore directed; and in the next place, to pay off such of the aforesaid debts of the said Sir *Neal O'Donel* as may then remain unpaid, and as specified in the second schedule hereunto annexed, the same to be paid in such manner as shall appear to the said trustee most advisable. And after payment of the several outgoings hereinbefore mentioned, the residue of the said rents, issues and profits, during the continuance of these presents, to be laid out as the said trustee or trustees may deem most expedient, to accumulate as a fund either to discharge or pay back the sum or sums that may be raised under the power aforesaid, or, with the consent in writing of the said Sir *Neal O'Donel*, to pay off any of the debts or incumbrances affecting the said estates, specified in

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the said first schedule, that may be called in by the person or persons entitled thereto, or which it may be proper to pay off for the purpose of reducing the rate of interest to be paid thereon in future ; such debt or incumbrance when so paid to be assigned to a trustee for the said Sir *Neal O'Donel*, and the said Sir *Neal O'Donel* to be an executing and consenting party to all such assignments."

The first item of charge in the first schedule was the arrear in respect of the rent of 980 *l.*, which, with the costs, was to be paid in preference to any other demands out of the first monies to be raised pursuant to the powers given for that purpose by the annexed deed.

The second schedule annexed to the deed related to the debts of Sir *Neal O'Donel*.

On the 13th of *March* 1826, pursuant to an order for that purpose made in the redemption suit, a sum of 4,002*l.* 1*s.* 3*d.* old Government 3½ per cent. stock, being the property of *Richard* Earl of *Lucan*, the father of Respondent, was transferred to the credit of said redemption suit. The Appellant was alleged to have been ignorant of such transfer, or any negotiations respecting same, until he was informed thereof by *William Furlong*, the solicitor of Sir *Neal O'Donel*, on the 17th *March* 1826.

On the 13th *June* 1826, shortly previous to the election for the county of *Mayo* which took place in that month, *Richard Livesay*, the solicitor of Lord *Lucan*, called at the office of *William Furlong*, and produced to him a copy of a letter which he proposed the Appellant should write, as the Appellant alleged, for the purpose of showing that the sum of money so advanced by Lord *Lucan* had nothing to do with said election ; but the said *William Furlong* did not approve

of said draft letter, and with a view to meet the wishes of said *Richard Livesay*, he prepared a draft of another letter, which said *Livesay* with some slight alterations approved of: and that it might more effectually appear by said letter that the business of the election had nothing to do with the transfer of said stock, it was agreed upon between the said *Richard Livesay* and said *William Furlong*, that said letter should bear date the 23d day of *February* 1826, ten days after the execution of the trust deed, and previous to the transfer of said stock. This purpose in writing the letter was denied by the Respondent.

The letter was addressed to Mr. *Richard Livesay*, and though really written in *June* 1826, bore date on the 23d of *February* 1826, and was in the words following:—"Dear Sir,—Sir *Neal O'Donel* has now executed the deed vesting all his life estate in me, in trust to raise money, in the first place, to pay the rent and costs of the ejectment pending; and next, to pay the interest of the incumbrances. If you will prevail on any client of yours to advance three or four thousand pounds in time to pay the rent and costs, or even on account of it, I will consider such advance as raised by me under the power given me; and will, whenever you please, exercise that power, by securing such advance in the best manner I am empowered by the deed: it being distinctly understood that, in doing so, I am not to be in any way personally answerable for either the principal or interest, further than as trustee for the due application of the rents pursuant to the trust deed.—I am, dear Sir, yours very truly, *Peter Digges La Touche*."

After the letter had been signed by Appellant, and during the time which elapsed between that period and the 1st of *March* in the year 1827, when Sir *Neal O'Donel* departed this life, several negotiations were

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carried on between *William Furlong*, acting as the Appellant's solicitor, and *Richard Livesay*, as solicitor of Lord *Lucan*, for the purpose of devising some mode of giving Lord *Lucan* the benefit of the trusts of the deed of the 13th of *February* 1826, with reference to the advance so made by him ; but no deed was executed, and all further negotiations on the subject were terminated by the death of Sir *Neal O'Donel* on the 1st of *March* 1827. His son, *Hugh James Moore O'Donel*, succeeded to the baronetcy, and died, leaving a daughter, in 1828 ; when his brother, *Richard Annesley O'Donel*, entered into possession of the estates.

On the 21st *August* 1828, the widow of Sir *H. J. M. O'Donel* filed a bill in Chancery in *Ireland*, on her own and her daughter's behalf, claiming her jointure, and also interest charged on the estates by Sir *H. J. M. O'Donel* for his daughter; and for a receiver over the estates : and by certain orders pronounced in that cause, *Alexander Clendinning*, esquire, was appointed receiver over the trust estates.

On the 26th *January* 1829, the Appellant, who was entitled to the interest of certain judgments comprised in the schedule to the deed of the 10th of *October* 1798, and which had been assigned to trustees on his marriage with his present wife, filed a bill against Sir *Richard O'Donel* and others, for the purpose of getting a receiver to keep down the interest due on the several incumbrances affecting the estates, and for a sale ; and Mr. *Clendinning* was also appointed receiver in that cause.

The estates over which Mr. *Clendinning* was appointed receiver, and which are the estates comprised in the trust deed of the 23d of *February* 1826, produced an annual income of about 8,400*l.*

On the 21st of *March* 1827, the Earl of *Lucan*,

since deceased, on behalf of himself and all other persons interested under said deed of the 13th *February* 1826, exhibited his bill in the Court of Chancery of *Ireland*, against the Appellant, and also against the widow of Sir *Neal O'Donel*, Sir *Hugh James Moore O'Donel*, *Richard Annesley O'Donel* (now Sir *Richard Annesley O'Donel*, baronet), *Mary O'Donel*, *Anna O'Donel*, *Margaret O'Donel*, *Catherine O'Donel*, and *Isabella O'Donel*; and thereby stated the proceedings by ejectment taken by the Marquis of *Sligo* for the recovery of the rent due out of the *Newport* freehold estate, and the proceedings in the Court of Chancery on the part of Sir *Neal O'Donel* to redeem said estate, the loan, and the other matters above detailed; and prayed that the trusts of said indenture of the 13th of *February* 1826 might be decreed to be carried into execution, and that an account might be taken of the sums received by the Appellant, of the rents, issues and profits of said trust estates since the execution of the said deed of trust of the 13th day of *February* 1826, and how the same had been applied and disposed of; and that an account might be taken of the sum advanced by said *Richard* Earl of *Lucan*, for the redemption of the said lands under ejectment; and that the same, together with legal interest thereon from the time when the same was so advanced, might be decreed to be well charged on the said trust estates so conveyed to the Appellant for the life of Sir *Neal O'Donel* the younger, in priority to all other charges created by the said trust deed, save the cost and expenses incident to the preparation of the said deed, and the execution of the trusts thereof.

The Appellant put in his answer; and some of the parties having died and the suit having been duly revived, the cause came on for hearing on the 26th

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of *May* 1836, when the Lord Chancellor of *Ireland* made a decree to the following effect:—"It is adjudged and decreed that the plaintiff is entitled to the benefit of said trust deed; and accordingly it is hereby referred to *William Hem*, esq., one of the Masters of this Court, to take an account of the sums received by the said *Peter Digges La Touche* out of the rents, issues and profits of the said trust estates, since the execution of the deed of trust of the 13th *February* 1826, and how the same has been applied and disposed of; and also to take an account of the arrears of rent due out of the trust premises at the time of the execution of the trust deed. And it is hereby also ordered, adjudged and decreed, that it be referred to the Master to take an account of the sum advanced for the redemption of the said lands so under ejectment. And it is hereby ordered, adjudged and decreed, that the same, together with the legal interest thereon from the time when the same was so advanced, be well charged on the said trust estates so conveyed to the said *Peter Digges La Touche* for the life of the said *Sir Neal O'Donel* the younger, in priority to all other charges created by the said trust deed, save the costs and expenses incident to the preparation of the said deed and the execution of the trusts thereof. And it is further ordered that the said Master do take an account of the sums, if any, due and owing to all other persons interested under the trusts of the said deed."

The present was an appeal against that decree.

Mr. *Pemberton*, for the Appellant:—What is the foundation of the Respondent's claim in this case? It is that he is a *cestui que* trust under the deed, and that he is entitled to call for execution of the trust. He claims to stand in the place of the Marquis of

Sligo, to whom an arrear of head rent was due, and who was paid with money advanced by him. But even the Marquis himself could not have called for execution of this trust, though avowedly made to secure payment of his claim ; for it was a trust between different parties, not creating any equitable obligation as to him. He is not a party to the deed, nor is there any good consideration for such an obligation. Lord *Sligo's* rights may be and are sufficiently well secured, but they are not secured by the provisions of this deed in such a manner as to make him a *cestui que* trust under it ; *Garrard v. Lord Lauderdale*(a). A party cannot become a *cestui que* trust by any act of his own. Here the Respondent merely advanced a sum of money to the trustee, in the expectation that the trustee had the power under the trust deed to raise money to pay off that advance. Such an act will not constitute the person advancing the money a *cestui que* trust ; *Palk v. Clinton* (b). There the rule of equity on this point was clearly laid down by Sir *W. Grant*, Master of the Rolls, who said (c), " The first question is whether the plaintiff has any right to the relief he seeks against the trustees. For the defendants it is contended that, having raised 44,000*l.* by mortgage, they are *functi officio* with regard to their trust, which was to raise that sum by sale or mortgage : they have raised it by mortgage, and therefore the trust, so far as it respects them, it is said, is completely performed. Without entering into the question how far it was competent to the trustees to make a sale, either of their own authority or by that of the owner of the estate, if he was not an infant, for the purpose of paying off the mortgage, this plaintiff has no right

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(a) 3 Sim. 1 ; 2 Russ. & M. 451.

(c) Id. 55.

(b) 12 Ves. 49.

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whatever to call upon them to sell in order to pay him. He is no object whatsoever of the trust, farther than as that trust enabled the trustees to make him a good mortgage; when he has that, he is in the ordinary situation of a mortgagee. He gets nothing more than that. He has all the remedies, but only the remedies, of a mortgagee. All the other objects of the trust are foreign to him. He has also nothing to do with them. I may say that it is at least very doubtful, upon the true construction of this deed, whether the trustees could make a sale after they had raised the money, by mortgage. But it is not necessary to give a direct opinion upon that point; as, if they choose to resist the plaintiff's demands, he has no right to compel them to try whether they can or cannot procure a purchaser to take such a title as they can make him under this trust deed."

In like manner it is impossible to understand how the Appellant can be treated as a trustee for this particular purpose. Suppose the Respondent had had the security of this trust deed, he would not have been entitled to an account of the by-gone rents, nor of the future rents, except from the moment of failure of payment. Now here there is not even a suggestion of a default; and therefore the Respondent could not, upon his own statement of his case, have had what he now claims.

Mr. *Jacob*, on the same side:—In *Worrall v. Harford* (d) there was a trust deed for the benefit of creditors; and the trust was, in the first place, to pay the expense of a commission of bankrupt, which commission happened ultimately to be superseded.

(d) 8 Ves. 4.

The solicitor to the commission there imagined that, as the deed was intended to secure payment to him, he had become a *cestui que* trust under the deed, and he filed a bill and asked for an account of the trust property. There was a demurrer to that bill, and Lord *Eldon* said that the case must depend on the provisions of the particular deed, and that it could not be implied that persons employed by the trustees became therefore creditors on the trust fund. Apply that rule here, and then it is plain that there are no words in this deed creating a trust in favour of the Respondent, and that no such trust can be implied. Suppose that in 1826 the Respondent had a mortgage deed instead of this letter, what would have been the result? Would the mortgagee have had a right to file a bill for an account of the rents received before the time when the sum became due, and before the date of the mortgage security? Certainly he would not. The question now is whether the Appellant is to pay over again the sum which he has once paid for the benefit of Sir *Neal O'Donel*. But even supposing the Respondent to be an incumbrancer under this deed, still he cannot be entitled to what he now asks. The decree is founded on a forgetfulness of the rule that an incumbrancer or mortgagee cannot claim an account of by-gone rents and profits. In all respects, therefore, it is incorrect and must be reversed.

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Mr. *Knight* and Mr. *J. Russell*, for the Respondent:—The Earl of *Lucan* is the only Respondent in this appeal, yet the decree really interests all those who were parties to the suit in the Court below. This is a circumstance to be considered by the House, since this is a case in which it now appears that

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all persons except this one Appellant are satisfied with the decree of the Court below ; and even this appeal was not presented till nearly one year after the original decree had been pronounced. That is a wilful procrastination on the part of the Appellant, which certainly entitles the Respondent to costs. In the creation of a trust a valuable consideration is not necessary : as between the *cestui que* trust and the trustee it may be wholly without value, and the former may enforce the performance of it by bill, though he may not be able to sue on it at law. Neither is it necessary that the objects of the trust should be parties to the deed creating the trust. A man desirous that his property should not be subject to the legacy duty, may make a settlement of it in his lifetime. He will constitute a *cestui que* trust as the object of his bounty, and a trustee for the purposes of his bounty ; and the former may file a bill against the latter, to obtain the benefit intended to be secured to him, not as against the author of the trust, but as against the trustee, who holds the character with all its incidents and consequences. So that the mere circumstance that creditors are the objects of the trust, and that they are not parties to the contract, cannot make any difference in the matter. The nature of the object must decide the question whether it is a trust or not. Here it is clear that it was so intended to operate. The Respondent's money has regained the estate, and he is therefore entitled to be primarily satisfied. This deed was intended to be binding on the trustee for his benefit. The letter shows that the payment was to be made by the late Lord *Lucan* with reference to the deed. The answer does not put in issue the right of the *cestui que* trust, or his title to sue ; and whether the House looks at the deed with

its accompanying circumstances, or disregards extrinsic circumstances altogether, it is clear that it is a deed of trust of which the Respondent is entitled to have the benefit. The decree is founded on the clearest principles of equity as applicable to the particular circumstances here; and this appeal, which only opposes technical objections to plain rules of law, must be dismissed.

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Mr. *Pemberton*, in reply:—The Appellant does not, as it is said on the other side, oppose technical objections to plain rules of law. It is said that the Respondent's money has regained the estate, and therefore that he ought to recover; but the answer to that argument is, that the trustees of the estate had not the least shadow of a right to give him the priority he claims. The Respondent has three things to make out: first that he is a party to this deed; and secondly, that the trusts required that every shilling of the rent should be applied in the way he now demands; and thirdly, that he did not assent to any different application of these rents, but that in the lifetime of Sir *Neal O'Donel* he called for them to be applied in this particular manner. Not one of these things has been established by the other side. This is a deed merely between the principal and the agent, settling the mode in which the agent shall perform the business of the principal. It does not give the *cestui que* trust, even supposing the Respondent to stand in that situation, any power to call for an execution of the trust. On these grounds it is clear that the decree of the Court below cannot be supported.

The *Lord Chancellor*:—In this case there was an appeal against the order of the Lord Chancellor of

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Ireland, by whom a decree has been made in the following terms.—[His Lordship read it.]—This arises under a trust deed by which a tenant for life of certain estates, partly leasehold and partly freehold, conveyed what interest he had in those estates to trustees for special purposes named in the deed. As to the leasehold estates, Lord *Sligo*, who was the owner of the fee, and so entitled to the head rent, had proceeded to recover, in an action of ejectment, the lands liable to that rent. According to the provisions of the Ejectment Acts in *Ireland*, a certain time is allowed to a tenant to pay the rent so due; and by paying it within that time he is to be allowed an advantage, which is equivalent to redeeming the lands so recovered in ejectment. To effect this purpose, the tenant for life executed a trust deed by which he conveyed his property to the Appellant as trustee, with a declaration of trusts to pay the rent, and to raise 10,000*l.* by way of mortgage for the payment of such rent and of other charges. It appears, though the history of it is not accurately known, but it appears by the evidence that a sum of money was paid into Court, in order to meet this demand of the Marquis of *Sligo*. That money appears to be the money of Lord *Lucan*. There is evidence of some previous communication as to that money being paid into Court, but the bill states that it was paid into Court in this case. On this subject the following letter was written.—[The Lord Chancellor read the letter dated 23d *February*.]—Now the principal question is, in what manner that letter is to be treated; whether as an undertaking to give to the person advancing the money a priority over all other claimants on the estate; and if so, whether it was in the power of the trustee under the deed to give to such person an advantage of that kind.

The allegation in the bill is, that on the faith of this letter the advance was made. The letter was dated in *February* 1826. The advance really took place at a period subsequent to that time, and there seems no reason to doubt that the letter was in fact written after the advance had actually been made; the letter being antedated to serve a particular purpose. Yet the allegation in the bill is, that the advance was made on the faith of that letter. Those, therefore, who gave instructions for filing this bill, put a case on the record which they must have been aware could not be supported by the evidence. There were some negotiations as to the money, the time at which it was to be paid, and the time of the repayment; but with regard to that, it is to be observed that Lord *Lucan* and the Marquis of *Sligo* were not parties to the trust deed. The deed was entered into by the owner of the property for the purpose of disposing of that property in the way most advantageous to himself. The bill stated the trust deed, stated the letter, and the advance of the money, made, as alleged, on the faith of the representations of the Appellant (the defendant below); and asked that the trusts of this deed might be carried into execution.—[Here his Lordship read the prayer of the bill; and he also read the answer, which was in substance a denial of the allegations of the bill.]—Two questions arise on these pleadings: first, whether there was any right on the part of the plaintiff to call for an execution of the trusts of that deed independently of the letter; and, secondly, whether he, on account of that letter, was entitled to a decree in the terms prayed for. It does not seem that there was brought distinctly under the consideration of the Lord Chancellor of *Ireland* (e), that train of decisions which have established the law

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(e) 2 Drury & Walsh, 271.

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upon matters of this sort in this country ; that where a party creates a trust for the purpose of paying debts, the creditors not being parties thereto, cannot become *cestui que trusts* entitled to call on the trustees to execute the trusts of the deed. *Wallwynn v. Coutts*(f) was probably the foundation of all those decisions ; but the doctrine on which they proceed has been well established by *Garrard v. Lord Lauderdale* (g), and is now always adopted and acted on. Then how does the present case differ from those to which I have thus referred ? In my mind, there is no difference between them. As a party having a demand against the owner of the estate, the Respondent could not have a right to call for the interposition of a Court of Equity to enforce the satisfaction of that demand out of the trust fund. Under the circumstances of this case, equity could not allow the Respondent to come in and ask for the execution of the trusts of this deed. Lord *Sligo* had no equitable rights ; he had the legal right against the estate. But he was only a creditor, and not being a party to the deed, could not ask for the execution of it ; but even if he could, Lord *Lucan* is not placed in the situation of Lord *Sligo*. For the accommodation of the owner of the estate, Lord *Lucan* advanced the money by which the claim of Lord *Sligo* was satisfied : but that alone will not give him the same right as Lord *Sligo*. But as Lord *Sligo* had no such rights as those now asserted by Lord *Lucan*, it is not material to consider the question of the relative rights of these parties.

Then how stands the case with regard to this letter ? The letter was dated in the month of *February*, before the money had been paid into Court, but was in fact written after that payment had been made ; and there

(f) 3 Mer. 707 ; 3 Sim. 14. (g) 3 Sim. 1 ; 2 Russ. & M. 451.

was in it an undertaking by the trustee that he would give such security for the repayment as he could under this trust deed. But that did not make the creditor a *cestui que* trust under the deed. He was by that letter to have some security. The only security that could have been given was under the deed to raise 10,000 *l.* by mortgage of the estate. That plan of a mortgage did not go on.

It would have deprived the family of the benefit of the proceeding, and the drafts which were drawn show that it was not to have any such effect. The negotiations went on, and objections were made to several proposals, until an event occurred which prevented the possibility of the contract being carried into effect. That was the death of the tenant for life, out of whose estate the charge was to be paid. The result is, that the contract for the purpose of creating a charge upon that property was (by parties having control over an uncertain fund depending on the life of another) extended, until the dropping of the life prevented its being carried into effect. But the effectuating such a contract is not either the object of the suit nor the purport of the decree. It is not necessary to decide here what might have been the result of such a suit had it been commenced. The Court below has granted relief on the supposition that the creditor here was a *cestui que* trust under the deed, not only for the purpose of obtaining the benefit of the charge, but for the purpose of calling for the repayment of these sums of money, alleged to have been advanced on the understanding of all parties, including the party who now prefers this complaint. I cannot suppose but that this decree proceeding on such a view of the case, was made in consequence of not calling the attention of the Court to the well-established doctrine of equity to which I

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have before referred. If your Lordships agree with me on that point, then I must advise your Lordships that the decree, as now framed, cannot stand. The demand here is made in a shape which is not consistent with the principles established by decided cases. On these grounds, therefore, I move that the decree be reversed.

Decree reversed. The bill to be dismissed with costs up to the decree on the 26th of *May* 1836.

The Right Hon. CHARLES PHILIP, EARL } *Appellant.*
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June 5, 6.

SIR CHARLES EURWICKE DOUGLAS - - *Respondent.*

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A TESTATOR by his will gave the residue of his personal estate to his wife for her life, and after her decease to Sir C. E. D. absolutely: he subsequently, by a codicil, which did not affect the gift of the residue, altered his will in some respects, and confirmed it in every other. Next day he made a second codicil, by which he gave some pecuniary and specific legacies, and concluded thus: "All the rest and residue of my property, not hereinbefore (or by my will or any other codicil) disposed of, I give and bequeath to my nephew, C. P. Y. and to Sir C. E. D., their executors, administrators and assigns, after the death of my said dear wife, equally to be divided between them."—HELD, (the Lord Chancellor *dissentiente*,) that the above clause of the second codicil was a revocation of the gift, by the will, of the residue to Sir C. E. D., and that he was accordingly only entitled to an equal share thereof with C. P. Y.

*Will
and Codicils—
Construction.
Residue.*

THE Right honourable *Charles Philip Yorke*, second son of the Honourable *Charles Yorke*, and next brother of *Philip*, late Earl of *Hardwicke*, had, at the time of making his will, and at the time of his death, a power, under a settlement executed in *May* 1813, of charging Lord *Hardwicke*'s property at *Wimpole* in *Cambridgeshire*, by will, with the payment of the sum of 12,000*l.*, to be raised upon the death and failure of male issue of the said Lord *Hardwicke*.

On the 19th of *April* 1827, Mr. *Yorke*, in accordance with this power, made a will, (attested by three witnesses, and in all respects duly executed in manner required by the settlement of 1813,) by which, after making a provision for his wife, and bequeathing to her the sum of 500*l.* to be paid to her within six calendar months next after his decease, and giving

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her the use of either his house in *Bruton-street, London*, or at *Bonningtons* in *Hertfordshire*, together with the furniture belonging to it, for her life, he directed that the whole of the sum of 12,000*l.* should be raised, in pursuance of the said power, and paid to his executors, as soon as conveniently might be after the decease and failure of male issue of the said Lord *Hardwicke*; and that it should be considered as part of his general personal estate. The testator then bequeathed the said sum of 12,000*l.*, and also all his leasehold estates in *Bruton-street*, and at *Bonningtons*, or elsewhere, and all his monies and securities for money, household goods, furniture, plate, pictures, books, goods, chattels, and other personal estate and effects whatsoever and wheresoever, subject to the bequests before made in favour of his wife, and also to the payment of his debts and funeral and testamentary expenses, and such legacies as he might thereafter bequeath by any codicil or codicils to his will, unto his said wife *Harriet Yorke*, and his friends *C.W. Manningham*, *Sir E. Hyde East*, *W. M. Leake*, and *T. Atkinson*, and their executors, administrators and assigns, upon trust that they, and the survivors and survivor of them, &c. should, as soon after his decease as they, she, or he should think proper, sell and dispose of such parts of his said leasehold and residuary personal estates and effects respectively as should be in their nature saleable, and get in and receive such parts thereof as should not be in their nature saleable, and invest the monies to arise from such sale or sales in their, her, or his names or name, in the public stocks or funds, or upon real or Government securities in *England*; and should stand possessed of the said stocks, funds and securities, and also of all such part of his residuary personal estate and effects as

should consist of stocks, funds or securities at his death, upon trust, during the life of his said wife, to receive and pay to her, or permit her to retain for her own use, all the dividends, interest and annual proceeds of the said several stocks, funds and securities, trust-monies and premises respectively, when and as such dividends, &c. should become due. The will then proceeded: "And from and after the decease of my said wife *Harriet Yorke*, upon trust, to assign, transfer and pay all the said stocks, funds and securities, trust-monies and premises, and every of them, and every part thereof respectively, unto my natural son *Charles Eurwicke Douglas* (wishing him to use the name of *Eurwicke* only), his executors, administrators and assigns, for his and their own absolute use and benefit, in case he the said *Charles Eurwicke Douglas* shall be living at my death, and shall then have attained, or shall afterwards live to attain the age of 25 years, or be married with the previous consent of my said wife *Harriet Yorke*, during her life; or after her decease, with the consent of the said *C. W. Manningham*, Sir *E. Hyde East*, *W. M. Leake*, and *T. Atkinson*, or the survivors or survivor of them, his executors or administrators."

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The testator then proceeded to dispose of his residuary property (in favour of the Appellant), in case *C. E. Douglas* (the Respondent) should die in the testator's lifetime, or under the age of 25, without having been married with consent: and he appointed Mrs. *Yorke* executrix, and the other trustees executors.

The Respondent attained the age of 25 years in 1831; and in *December* 1832 he married Miss *Des Vœux*, daughter of Sir *Charles Des Vœux*, baronet, with the testator's consent and approbation. The lady's fortune was, upon the marriage, settled by an inden-

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ture, dated the 22d of *December* 1832; by which the testator, a party thereto, settled upon the Respondent and Lady *Douglas*, and upon the issue of their marriage, the sum of 10,000*l.*, invested in securities, which had been transferred into the names of the trustees of the settlement for that purpose: and he, as a further provision for the Respondent, covenanted that his executors should, upon the decease of himself and Mrs. *Yorke*, pay the trustees an additional sum of 10,000*l.*, or transfer to them securities of that value, to be held on the same trusts as those declared respecting the previous sum of 10,000*l.* It was provided, however, that if the testator should give the Respondent in his lifetime, or bequeath to him by will or any codicil, any sums of money, stock, or personal estate, such gift or bequest should be applied in satisfaction of the covenant for the payment of the additional sum of 10,000*l.*

On the 1st of *May* 1833, the testator made a codicil to his will, which was likewise attested by three witnesses. He thereby (after reciting that part of his will relating to the charge of the sum of 12,000*l.*) confirmed the charge upon the property specified in his will; and further charged all his brother's estates, which he had power to charge, with the payment of that sum; but directed that it should not be raised during Mrs. *Yorke*'s life, provided interest at the rate of 4*l. per cent.* was punctually paid. He directed that 5,000*l.*, part of the charge of 12,000*l.*, should be paid, after the death of Mrs. *Yorke*, to the trustees named in the Respondent's marriage settlement, in part satisfaction of his covenant for payment of 10,000*l.*, and directed that the remainder of the 10,000*l.*, should be paid out of his general personal estate: that 2,000*l.*, other part of the 12,000*l.*, should be

paid to *T. Atkinson* and the Respondent, upon certain trusts; and that the remaining 5,000 *l.* should not be raised if any son or grandson of the testator's late brother, Sir *Joseph Sydney Yorke*, should be entitled in possession to the estates charged: and that they should be altogether discharged from the payment of that portion. And he "ratified and confirmed his said will in every other respect whatsoever."

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On the following day the testator made another codicil to his will, entirely in his own handwriting (*a*), and unattested, commencing thus: "This is a codicil of specific and pecuniary legacies, to be also added to my will." By this codicil he added the Appellant's name to the number of his executors, and bequeathed to such of them as should act the sum of 20 *l.* for mourning. To several relations he gave pecuniary legacies, to be paid to such of them as should be living at Mrs. *Yorke's* death; among them was a legacy of 100 *l.* to the Appellant. The testator then, after bequeathing several small annuities to different persons, and several specific articles to different friends, concludes as follows: "I give all my swords and other arms to Sir *Charles Eurwicke Douglas*, knight (the Respondent), together with my gold watch, chain, and seals, and the sum of 100 *l.*, to be paid to him as soon as convenient after my decease *All the rest and residue of my property, not hereinbefore (or by my will or any other codicil) disposed of, I give and bequeath to my nephew, Charles Philip Yorke, and to Sir Charles Eurwicke Douglas, knight, their executors, administrators and assigns, after the death of my said dear wife, equally to be divided between them; and I leave it at the option of Sir Charles Eurwicke Douglas*

(*a*) The will and first codicil were prepared by his solicitors.

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to assume or not the name of *Eurwicke* singly, or to bear it as at present, without alteration.—Signed by me, *C. P. Yorke*, 2d *May* 1833.”

At the time when both the codicils were made, the Appellant had become, by the death of his father Sir *Joseph Sidney Yorke*, next heir presumptive, after the testator, to the earldom, and to the estates upon which the sum of 12,000*l.* was charged: and so continued till the death of the testator, which took place on the 13th of *March* 1834, without his having altered or revoked his will or codicils, except so far as the will was altered or revoked by the codicils. Shortly after his death, his will and codicils were proved by the Respondent and Mr. *Leake* and Mr. *Atkinson*, with the usual power to the other executors likewise to prove them when they should think fit: and the personal estate was ascertained to be of considerable value.

The Respondent considering himself entitled under the will to the whole of the residuary personal estate in remainder expectant upon the decease of Mrs. *Yorke*, applied to his co-executors to account for all the testator's personal estate and property, not specifically bequeathed. They alleged that, by reason of some difficulties in the construction of the will and codicils, they were unable to act without the direction of the Court of Chancery, especially as the Appellant claimed, under the last codicil, an equal share with Respondent in the residuary property.

On the 4th of *July* 1834, the Respondent filed his bill in the Court of Chancery, against Messrs. *Leake* and *Atkinson*, Mrs. *Yorke*, and the Appellant; praying that the usual accounts might be taken, “and that the clear residue of the testator's personal estate and effects might be ascertained, and might be in-

vested and secured upon the trusts of the said will ; and that the rights and interests of the Respondent and of all other parties, in or to the same, might be ascertained and declared."

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The several defendants appeared, and put in their answers to the bill. The Appellant, in his answer, insisted that he was entitled to an equal share of the testator's residuary estate with the Respondent, on the decease of Mrs. *Yorke*, under and by virtue of the second codicil. The Appellant, while the cause was pending, succeeded to the earldom, by the death of his uncle without male issue.

The cause came on to be heard on the 16th of *November* 1835, before Sir *C. C. Pepys*, Master of the Rolls; and his Honor, by his decree(*b*) on the 19th of *November* 1835, declared that, according to the true construction of the said will and codicils, the Respondent was entitled to the clear residue of the testator's personal estate, subject to the life interest therein of Mrs. *Yorke*; and his Honor ordered that the bill should be dismissed as against the defendant, the Earl of *Hardwicke*.

Against that decree the Earl of *Hardwicke* appealed to this House. The appeal was argued on the 5th and 6th of *June* 1837 (*c*).

Mr. *Pemberton* and Mr. *Knight*, for the Appellant:—The only question in this appeal is, whether the benefit given by the will to the Respondent exclusively in the testator's residuary personal estate, on the death of Mrs. *Yorke*, is not taken away by the last clause of the second codicil, and divided between

(*b*) Reported *nom. Douglas v. Leake*, 5 Law Jour. 25 (N. S.)

(*c*) There were present the Lord Chancellor, Lord *Lyndhurst*, and Lord *Brougham*, besides other Peers.

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the Respondent and Appellant. It is not of any consequence that this codicil is not attested. The effect of the decree is to strike out the whole of the last clause: "All the rest and residue of my property not hereinbefore (or by my will or any other codicil) disposed of, I give and bequeath to my nephew *C. P. Yorke*, and Sir *C. E. Douglas*, their executors, &c., after the decease of my dear wife, equally to be divided between them." The decree is at variance with two well-established rules in the construction of wills and codicils: 1st, that the Court is not to reject any, but, if it can, to give effect to all parts of the instruments, so far as they are not inconsistent; and secondly, where a subsequent gift by codicil is inconsistent with a former gift by will, that the subsequent gift shall prevail. The very reverse of those rules has been adopted in the construction put by the decree on these instruments. By the words, "not hereinbefore (or by my will or any other codicil) disposed of," the testator merely meant to except out of the residuary bequest in the codicil, the pecuniary and specific legacies thereinbefore given; and by adopting this construction, effect will be given to all parts of the will and codicils, except that part of the will which it was the intention of the testator to revoke. That such was his intention will more clearly appear by considering what took place in the family between the dates of the will and codicils. In that interval the Respondent was married to a lady of large fortune; and the testator, by the marriage settlement, to which he was a party, made a very handsome provision for the Respondent and his family. Having done so, he naturally enough reasoned thus with himself: "I have provided for my son; I shall now provide for my nephew, who is the presumptive

heir to the family title and honours, which, the more dignified, are the more burdensome also to the wearer." He accordingly, in addition to the other provisions for the nephew contained in the codicils, divided the residue of the personal estate between him and the Respondent. The words of ratification, which are often words of course, have here a peculiar propriety in a clause altering part of the will, and confirming it in all other respects.

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The case made for the Respondent, in opposition to the natural and recognised rules of construction, is that the testator, when he wrote the second codicil, forgot that he had by his will disposed of the residue of his property. But it was impossible he could have forgotten the will; he had it before him; and it was to meet the residuary gift in it, and after adverting to the circumstances that had taken place, that he penned this clause in the codicil. Why should he be supposed to make a codicil wholly inoperative? This alteration of the will was probably present to his mind when he signed the first codicil; but then, intending to reserve for another codicil the small pecuniary and specific gifts, and the directions about his remains, which he did not wish to publish to others while living, he reserved, for the same reason, the introduction of this alteration of the gift of the residue. He was himself fully competent to do this, and did not require the aid of solicitors or of witnesses.

The construction adopted in the decree, by extending the exception in the residuary clause of the codicil beyond its natural and necessary meaning, nullifies the whole clause for the sake of giving effect to a part. The testator had before, in his will and codicils, elaborately described and disposed of every species of personal estate to which he could possibly become

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entitled: the decree imputing to the testator the intention of giving by this clause in the codicil what he had not given before by the will or codicils, having given all before, makes him talk nonsense in most excellent grammar.

Mr. *Wigram* and Mr. *Solly Flood*, for the Respondent:—The bequest in the will in the Respondent's favour is clear beyond dispute; it is expressly ratified and confirmed by the first codicil; and not only are there no words in the second codicil calculated to show any *animus revocandi* on the part of the testator, but he appears, by the most emphatic language, to have guarded against such construction being put upon it. He might have apprehended that there were still some articles of property not disposed of, and for the greater caution he added this clause.

Besides the two rules of construction referred to in the argument for the Appellant, there is a third rule as fully recognised by the Courts; which is, that where a gift is made in a will in clear, unequivocal terms, it will require words equally clear to take it away. It must also be borne in mind that the province of a Court of Appeal is to correct the errors of the Courts below, but not to reverse their decisions because some doubt may be entertained of their correctness. That is the principle on which the Court of Chancery deals with appeals from the Rolls, or Vice-Chancellor's, Court.

It has been argued that it was in consequence of the change made on the Respondent's marriage that the testator made the alleged alteration in the gift of the residue. But there is no appearance of any alteration in the testator's regard for his son; the provisions made for him by the will are recognised in the deeds

and settlement subsequently executed, and are expressly confirmed by the first codicil. The effect of the codicil is to make the will speak as from that date; and accordingly down to the 2d of *May* 1834 there is an unqualified gift of the residue to the Respondent. That residue, given to five trustees for the benefit of the testator's wife and of the Respondent, cannot be the same residue given by the codicil between the Respondent and Appellant; nor can the latter be a substitution for the former: that would be contrary to all the rules of construction. The residue disposed of by the codicil is the residue, "not before disposed of," of things *ejusdem generis* with the other articles bequeathed by that codicil. Those words of qualification and restriction must be explained away before the Appellant can make out his case. This was a sweeping clause added by the testator *ex majori cautela*, to provide for the disposition among those two legatees of any of his property, if any might by accident remain undisposed of; and the decree, instead of revoking or nullifying any of the testamentary instruments, gives effect to them all.

The testator had recourse to his solicitors in disposing of his property generally by his will and first codicil; but in giving the small pecuniary legacies and specific gifts of particular articles to friends and relations, he took upon himself to distribute them without calling for any assistance. The words of the second codicil are not ambiguous, or in any way difficult to be dealt with. What the testator by them gave to the Appellant and Respondent jointly is, "all the property which he had not by that, the second codicil, or by his will, or any other codicil, disposed of." To all that, it is conceded, the Appellant is entitled equally with the Respondent; but under

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the residuary gift in the will, which the testator ratifies, the Respondent is entitled to the whole residue; so that, in fact, there is nothing left for the formal words of the residuary clause in the second codicil to operate upon. It is impossible to suppose that the testator, having confirmed his will by the first codicil, except as therein stated, on the 1st of *May*, should on the next day make so very material an alteration in it as is contended for by the Appellant.

Mr. *Pemberton* replied:—The first and second codicils may be said to be contemporaneous. There was no change of intention on the 2d of *May*, for the intention then carried into effect was entertained on the 1st of *May*. But what remained to be done on the 2d was so easy, and at the same time so proper to be kept private, that the testator chose to do it alone and at his leisure. There was, however, a change of intention between the times of making the will and the codicils. The first codicil materially changed the will; and why should not the second also? Why should this eminent person put this clause in the codicil, if he did not intend it to have effect? The alterations of the will by both codicils are consistent with the changes which took place in the son's circumstances by his marriage settlement after the date of the will. It must be admitted, that if the words "not hereinbefore, &c. disposed of" be struck out, the clause would operate on the residue. But the introduction of these words does not make the clause useless. What is "rest and residue" but what is not before disposed of? Having before in his will given the benefit of the residue to his wife for life, he does not repeat that gift in the codicil, but gives the residue after her death to his son and nephew. The testator, when he

gave the whole residue to his son, imposed a name on him; but afterwards, on taking half the residue from him, he released him from that obligation.

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The *Lord Chancellor*, after conferring with Lord *Lyndhurst* and Lord *Brougham*, said their Lordships entertained some doubts on that question.

The case was postponed for consideration.

Their Lordships having required further argument by one counsel on each side :

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Mr. *Pemberton*, for the Appellant :—The provisions in the will were not framed with a view to Sir *Charles Douglas's* attaining the age of 25 and marrying in the testator's lifetime. Had the testator died before these events happened, without altering the will, Sir *Charles Douglas* would not have immediately taken an absolute interest in the residue, but only contingent on his living to attain 25, and marrying with consent; and the Appellant would have a contingent interest on either event not taking place. But the testator lived to see both events accomplished; and accordingly, on the occasion of his son's marriage with his entire approbation, he made for him those provisions which were to supersede the provisions made by the will. Most of the clauses in the will become inapplicable to the Respondent's altered condition. At the date of the will, he was a student of *St. John's College, Oxford*; so the testator describes him in a deed executed by him the same year; but he was settled in life when the codicil was made, and to the change of circumstances the testator adapted the testamentary disposition of his property.

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Mr. *Wigram*, for the Respondent:—The only difficulty in this case is as to the meaning of the words “rest and residue not hereinbefore *nor by my will* or any other codicil disposed of.” But the whole residue was disposed of by the will. The words must be taken to have the same meaning as if the testator said, “except the residue which I have disposed of by my will.” It is asked why should Mr. *Yorke* add so useless a clause: but it is far better to hold words to be inoperative or useless, than give them a meaning which they cannot bear.—[Lord *Brougham*: The addition of the words “equally to be divided” means something.]—They cannot be referred to the residue disposed of by the will, because the whole of it is given to Mrs. *Yorke* for her life: it is therefore some other residue that the testator intended to divide equally between the Appellant and Respondent.—[Lord *Brougham*: Can there be such a thing as a residue excepted out of a residue? which is the meaning you put on this clause.]—It certainly appears absurd; but it is an absurdity of the testator’s creating. It may be said that “residue” is, like “surplus,” a word of flexible meaning. In *Page v. Leapingwell (d)*, Sir *W. Grant*, M.R., said, “It is no new thing to put a different construction on the word ‘surplus’ from that which it commonly bears;” And again, “Why may not I infer, from the expressions in this will, that the testator did not mean what the word ‘overplus’ usually imports, viz. whatever shall turn out to be the overplus; but that he was contemplating a certain overplus, and was making his disposition accordingly?” Mr. *Yorke* may have meant by the word “residue” any sort of property that he might acquire after making the codicil, and which would in his own opinion remain undisposed of.

(d) 18 Ves. 466.

Mr. *Pemberton*, in reply :—It is admitted that the two codicils are to be taken as contemporaneous expressions of intention : it is also admitted that the testator, at the time he wrote the second codicil and introduced this second residuary clause, had before him both the will and the original residuary clause : and lastly, it is admitted that the effect of the construction which is put on this clause in the codicil by the judgment of the Court below will be to make this clause inoperative ; not inoperative because he left no residue, but necessarily inoperative at the very time that the residuary clause was written. Now is it possible to believe that, with the knowledge of all that he had before done, the testator then intended only to do what he knew would be inoperative ; and if not, is it not clear that he meant to alter the former residuary clause ?

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Lord *Brougham* :—My Lords, the question in this appeal arises upon the construction of the will and codicils of the late Mr. *Yorke*, brother of the half-blood of the late Earl of *Hardwicke*, uncle of the whole blood of the present Earl, the Appellant, and putative father of the Respondent ; and it turns mainly upon the concluding paragraph or clause of the second codicil. The case appears to stand thus : There are legacies in the will, and there is a gift of the residue : There are legacies in the codicil ; and then there is the clause in question : “ And all the rest and residue of my property not hereinbefore (or by my will or any other codicil) disposed of, I give and bequeath to my nephew, *Charles Philip Yorke*, and to Sir *Charles Eurwicke Douglas*, knight, their executors, administrators and assigns, after the death of my said dear wife, equally to be divided between them, and I leave it at the option of Sir *Charles Eurwicke Douglas* to assume or


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not the name of *Eurwicke* singly, or to bear it as at present without alteration."

It is certain that the testator had the will before him when the second codicil was made; when he wrote it, which he did himself. It is more particularly clear that when he added the clause in question, he had before him the gift of the residue in the will: for he makes an alteration in one portion of the residuary clause in the will, viz. a direction respecting the name to be borne by the Respondent. Then take the terms of the clause, "all the rest and residue of my property." Thus far all is plain. The question is, whether these residuary words are altered by what follows: "not hereinbefore disposed of." This too would still raise no doubt, because by "hereinbefore" he means "in the second codicil;" as seems plain from the words which come immediately after, "or by *my will or any other codicil.*" But it makes no difference if the two codicils are taken as one; and then "hereinbefore" means both of the codicils together, and has no reference to the will. Now, neither in the one codicil, nor in the other, is there anything like a residuary gift before the clause in question: therefore there can no doubt be raised as to the sense of the words "all the rest and residue of my property," by the qualification "not hereinbefore disposed of;" and consequently up to this point all is plain enough. But he adds, "or by my will;" and the question is whether these words do not qualify the preceding ones, or except from the gift the residue given by the will: if they do, they wholly annul the words and destroy the gift. The testator had the residuary gift in the will before him: therefore, to support this construction, it must be contended that, being aware of having given the residue in the will, he says in the

codicil, “ all the residue other than the residue already given,” or “ all the residue over the residue already given ;” which is not a sensible construction. If we read it, “ all the residue other than or over the legacies given,” it is only tautology, but a very usual tautology. If we take the clause as a gift with an exception, “ all the residue of my property except what I have given in my will,” we must read the exception so as not to destroy the gift ; or suppose it is not a gift with an exception, but only a qualification in a description of the thing given ; still it is more reasonable and more according to all just rules of construction to give such a sense to the qualification as shall not make the whole a nullity. The one construction makes the testator give “ all the residue of his property over the particular legacies given in the will and codicils ;” which is a sensible construction, and leaves something for the words to act upon. The other construction makes him give all the residue over the legacies and over all the residue ; that is, all that remains after the legacies and after what remains over these legacies ; which is not a sensible construction, and leaves nothing whatever. And it is material to observe that this is not a mere mistake of the testator, or an eventual defeat of his intention : it is not that he may have supposed he was giving something by the words when he had nothing to give ; but the construction assumes him to have intended this absurdity, for he had the former residuary clause before him ; and therefore, if he meant by the reference to the will a reference to that clause, so as to qualify by such reference the residuary gift now made, he must have known that he was making an exception or qualification which left nothing to give, and must have been aware of the absurd construction. It seems very difficult to sup-

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pose that he would frame a clause of this kind. The clause is framed with sufficient care, and indicates that he was aware of giving something material by it. He gives the thing, whatever it is, with reference to the time of its vesting in possession, namely, after the death of his wife, to whom he had before given it for her life; and he gives it to the parties, "their executors, administrators and assigns, to be equally divided between them." It seems a less strained construction to take the words in the parenthesis as they have now been taken, than in the sense put upon them in the Court below: and it seems a less violence to the instrument to hold, that the testator, having before him the residuary gift in the will, altered it in the manner supposed, than to hold that he made a gift to the parties, in equal moieties, of what amounted to nothing, and could not possibly amount to anything. The alteration which the construction now put upon the clause supposes, is in the persons who are to take an interest in the residue expectant upon the determination of the life interest given to the wife. By the will, the residue, after the wife's life interest, had been given to one of the parties: the codicil gives it to both equally.

I abstain from entering into any of the other arguments connected with the case, and from one or two observations which might be made in support of the view now taken; for this reason: The substance of what has been now stated was reduced into writing and agreed to by Lord *Lyndhurst* and myself; and we both deemed that it led to the conclusion at which, after considerable doubt, we have arrived. It was the conclusion to which we were inclined on the first hearing. The doubts occurred afterwards, but we now consider them to be removed. In these circum-

stances, as Lord *Lyndhurst* is absent, I prefer only stating the argument which he has seen, and in which he concurs. Although there has been no difference of opinion between us upon any of the other less-important matters, yet these not having been reduced into writing and considered by us in that shape, I have thought it better to omit them. The consequence is, that in concurrence with my noble and learned friend, who is unavoidably prevented from attending to-day, I shall now move your Lordships to reverse the decree below, and to make a declaration different from that which was made below as to the true meaning of the will and codicil, by substituting for that a declaration that the true meaning of the codicil is, that the Appellant and the Respondent should take the residue equally divided ; and to reverse that part of the decree which dismisses the Appellant from the suit. The accounts must of course go on : in fact that part of the decree is not appealed from ; the only part appealed from is the declaration.

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The *Lord Chancellor* :—My Lord *Lyndhurst* and my noble and learned friend having come to a conclusion upon these testamentary papers in favour of the Appellant, as the opinion which I have formed differs from that at which they have arrived in their superior judgment, I think it right, as it involves a question of principles, to state to your Lordships the ground on which I originally formed an opinion in favour of the Respondent, and on which I still consider that that is the sound construction of these testamentary papers. I think it is much more probable that the conclusion to which my noble and learned friends have come, is consistent with what the testator intended. I think the great probability is, that having

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given by his will the residue to Sir *Charles Douglas*, what he intended to do by his codicil was, instead of giving the whole residue to him, to divide it between him and another object of his bounty. The difficulty is, how far we are justified in coming to a conclusion which shall give effect to that probable intention: and I must say I find no words in this codicil which can lead to such a conclusion. It is more from the situation of the parties and the probability of the case that I infer that that probably was the intention of the testator, than from anything I find in the testamentary papers: but if the words do not bear it, it is contrary to all rule to speculate upon the intention; for the ground of conclusion ought not to be found in anything but the expressions which are used.

Now what actually is the state of the testamentary disposition? The testator gives the residue by the will to trustees, in trust, to pay the income to his wife for her life, and after her death to transfer the residue to Sir *Charles Douglas*: in the event of Sir *Charles Douglas* dying under a certain age, to go over: that, however, is immaterial, because he attained that age. Then by his codicil he gives various descriptions of property to different persons; money legacies to some, and specific articles to others: and then comes this clause: "All the rest and residue of my property not hereinbefore (or by my will or any other codicil) disposed of, I give and bequeath to my nephew *Charles Philip Yorke*, and Sir *Charles Eurwicke Douglas*, knight, their executors, administrators and assigns, after the death of my said dear wife, equally to be divided between them." In construing these words, the obvious course is to look back to the will to see what property there is not by that or any other codicil given, because to that subject-matter

stances, as Lord *Lyndhurst* is absent, I prefer only stating the argument which he has seen, and in which he concurs. Although there has been no difference of opinion between us upon any of the other less-important matters, yet these not having been reduced into writing and considered by us in that shape, I have thought it better to omit them. The consequence is, that in concurrence with my noble and learned friend, who is unavoidably prevented from attending to-day, I shall now move your Lordships to reverse the decree below, and to make a declaration different from that which was made below as to the true meaning of the will and codicil, by substituting for that a declaration that the true meaning of the codicil is, that the Appellant and the Respondent should take the residue equally divided ; and to reverse that part of the decree which dismisses the Appellant from the suit. The accounts must of course go on : in fact that part of the decree is not appealed from ; the only part appealed from is the declaration.

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The *Lord Chancellor* :—My Lord *Lyndhurst* and my noble and learned friend having come to a conclusion upon these testamentary papers in favour of the Appellant, as the opinion which I have formed differs from that at which they have arrived in their superior judgment, I think it right, as it involves a question of principles, to state to your Lordships the ground on which I originally formed an opinion in favour of the Respondent, and on which I still consider that that is the sound construction of these testamentary papers. I think it is much more probable that the conclusion to which my noble and learned friends have come, is consistent with what the testator intended. I think the great probability is, that having

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But there is considerable difficulty in supposing the testator to have intended revoking the former gift, because the residue by the will was given to trustees upon trust; and what he might have intended to do, and, I think, very probably did intend to do, was to say, "That interest which Sir *Charles Douglas* would have taken under the will, I intend to give equally between him and Mr. *Charles Philip Yorke*:" that would be the object which the testator must be presumed to have had, if the construction which my noble and learned friends put upon this clause, in order to carry out the supposed intention, is to prevail. Certainly the words employed do not, in my opinion, indicate any such intention. If one were to take the trouble of seeing how he would have expressed that intention which is now contended for, and what would be the way of carrying it into effect, meaning to revoke what he had given to any individual, and then intended for that individual and another, he would naturally have revoked that disposition, and have given all the rest and residue of his property, which rest and residue had been given to trustees, the ultimate trust being in favour of Sir *Charles Douglas*, to the trustees, for the benefit of those he then meant to favour. Under these circumstances I certainly have not been able to see that the expressions used are so flexible and so capable of being adapted to the intention supposed to be entertained by the testator, as to justify the construction which my noble and learned friends have thought themselves at liberty to adopt; but which, if adopted, would very likely carry his intentions into effect.

(It was ordered, that the decree be reversed; and it was declared, that the Appellant was entitled to an

equal share of the testator's residuary personal estate with the Respondent, on the decease of Mrs. *Yorke*, under and by virtue of the second codicil of the testator. And it was further ordered, that, with this declaration, the cause be remitted to the Court below.)

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The Right Hon. CHRISTIAN BROWN,
COUNTESS OF DALHOUSIE, and the
Right Hon. JAMES ANDREW, EARL } *Appellants.*
OF DALHOUSIE, her Son - - - - }

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March 2, 3. 5.
9, 10. 12.
August 10.

JAMES M'DOUALL, Esq. of *Logan* (a) - *Respondent.*

A *Scotch* marriage can legitimate the previously born children of the married persons, so as to enable them to succeed as heirs to real estate in *Scotland*.

Domicile.
Legitimation.
Marriage.

The child of a Scotchman, though born in *England*, becomes legitimate for all civil purposes in *Scotland*, by the subsequent marriage of the parents in *England*, if the domicile of the father was and continued throughout to be *Scotch*. Neither the place of the marriage nor the place of the birth of the child will, under such circumstances, affect the status of the child.

In matters to be determined by the domicile of the parties, it is a principle of law that the domicile of origin must prevail until the party has not only acquired another but has manifested and carried into execution an intention of abandoning his former domicile and acquiring another as his sole domicile.

In order to acquire a domicile there must be actual residence in the place chosen, which must be the principal and permanent residence of the party.

By marriage the domicile of the husband becomes that of the wife.

In 1796 a *Scotch* gentleman of fortune came with his regiment into *England*, bringing with him a young Scotchwoman then in

(a) This and the following case of *Munro v. Munro* were argued about the same time. Judgment was pronounced in both on the same day, and the noble and learned Lords who spoke in moving the judgment united the two cases in their observations. The arguments in each case are given separately; but as each noble and learned Lord made but one speech relating to both cases, the judgment in both will be printed entire at the end of the second case. See post, p. 894.

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a state of pregnancy. Her child was born in *England*, and he gave the usual bond to indemnify the parish against the chargeability of the infant. The young woman continued to reside with him and had other children by him, and in each instance a similar bond was given. His regiment was disbanded, and he was then returned to Parliament as Member for a *Scotch* county. He took a house, for the purposes of the children's education, in *Penrith* in *Cumberland*, and, when not in *London* attending his Parliamentary duties, was frequently staying at *Penrith*. In 1808 he executed a marriage contract, in which he was described as "of *Logan*" (*Scotland*), of the one part; and she was described as "*M. R.*" (her maiden name) "residing at *Penrith*, *Cumberland*, *South Britain*, of the other part." No other ceremony of marriage took place, but he shortly afterwards carried her to *Scotland*, and introduced her and the children as his wife and children.—HELD, that he had not lost his *Scotch* domicile; that his marriage was a *Scotch* marriage, and that his children were consequently entitled to succeed as heirs to *Scotch* estate.

THE late Colonel *M'Douall* of *Logan* was, in 1795, employed to raise a regiment of Fencible cavalry. It was embodied at *Dumfries*, and he marched with it into *England* on 9th *April* 1796. At that time Colonel *M'Douall* was a domiciled Scotsman.

Some time in the course of the year 1795, *Mary Russell* went to reside with Colonel *M'Douall*, at *Dumfries* and elsewhere in *Scotland*, and she became pregnant. She continued to reside with him, and accompanied him into *England*, when he went there with the regiment in *April* 1796. She was a *Scotch*-woman, and till then never had been out of *Scotland*. She was at this time visibly with child, so that the overseers of the poor of *Carlisle* obliged Colonel *M'Douall* to grant a bond, dated 28th *April* 1796, that her child should not become a burden on the parish. In that bond she was described as "*Mary Russell*, single woman."

James M'Douall, the pursuer, was born at *Chester* on 19th *October* 1796, and of course the period of his conception took place when both his parents were in

Scotland. Other children were born, and in every instance Colonel *M'Douall* gave the ordinary bond to indemnify the parish against liability. In each of these bonds the mother was described as "*Mary Russell*, single woman." The regiment was afterwards disbanded, and Colonel *M'Douall* was then returned to Parliament for the county of *Wigton*, and frequently resided in *London* in discharge of his parliamentary duties. But *Mary Russell* and her children lived at *Penrith* in *Cumberland*, where he had taken a house for them, and where he constantly visited them.

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Colonel *M'Douall* and *Mary Russell* executed at *Penrith* in *Cumberland*, on 9th *March* 1808, a marriage contract in the *Scotch* form, by which they accepted each other as lawful spouses, and by which he settled upon her, if she should survive him, an annuity of 400*l.*, payable from his entailed estates. In this contract he was described as "of *Logan*" in *Scotland*, and she was called "*Mary Russell*, residing at *Penrith*, in the county of *Cumberland*, *South Britain*." Immediately after this, Colonel *M'Douall* returned with *Mary Russell* as his wife to *Scotland*, and sasine was taken on this contract, on 12th *April*, in favour of "Mrs. *Mary Russell*, now spouse of Lieutenant-colonel *Andrew M'Douall* of *Logan*;" and they continued to live as man and wife constantly in *Scotland*, and were so known and recognised from that period forward. The marriage was thus constituted by declaration and open cohabitation alone in *Scotland*, and no ceremony of marriage took place either in *England* or in *Scotland*.

Colonel *M'Douall* was heir of entail to certain lands in *Wigtonshire*, to which, in default of lawful heirs to the Colonel, the present Appellants would

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succeed. The Colonel and the present Respondent, in 1832, brought a consistorial suit for declarator of the legitimacy of the present Respondent. The conclusion of the summons was, "And it ought and should be found and declared, by decree and sentence of the Lords of our Council and Session, that the said *James M'Douall*, pursuer, is the eldest lawful son of the said *Andrew M'Douall*, and, as such, is entitled to all the rights and privileges of a child born in lawful wedlock, and particularly, that he is entitled to succeed to his said father in his said heritable estate: and the said defenders ought and should be prohibited and discharged from interfering with the rights of the said *James M'Douall*, as eldest lawful son of the said *Andrew M'Douall*." The suit was continued by the present Respondent after his father's death. The Judges of the First Division of the Court of Session ordered the opinions of the other Judges to be taken. The consulted Judges agreed that the marriage, being that of a domiciled Scotchman, had legitimated the Respondent; and Lords *Gillies*, *Mackenzie*, and *Corehouse* concurred with them. The Lord President dissented, on the ground that the domicile of the putative father could not affect the case, and that the mother had lost her domicile of origin and acquired an *English* domicile; so that the children, who must, as illegitimate children, follow the mother's domicile, were subject to the law of *England*, and by that law were indelibly impressed with the status of bastardy at birth. The following interlocutor was pronounced by the Judges of the First Division, in accordance with the opinions of the majority:—"The Lords having resumed consideration of these conjoined processes, and advised the same, with the opinions of the consulted Judges, find it proved and established that the pursuer, *James M'Douall*, is the legitimate

son of the said late *Andrew M'Douall* of *Logan*: therefore find, decern, and declare in terms of the conclusions of the original and supplementary summons of declarator, in so far as respects the question of the said *James M'Douall's* legitimacy. *Quoad ultra*, remit the cause to the Lord Ordinary, to proceed farther as shall be just in respect to the other conclusions of the said conjoined actions.

(signed) “ *C. Hope*, I. P. D.”

This interlocutor was the subject of the present appeal.

Sir *F. Pollock*, for the Appellants:—The first question is, whether a child born in *England*, under the circumstances of this case, is rendered legitimate, according to the law of *Scotland*, by a subsequent marriage, so as to be capable of taking under an entail as the heir of the person last seised. It is clear that the Respondent was at his birth illegitimate; and that status being fixed on him at his birth by the law of the country where he was born, cannot afterwards be removed by the subsequent marriage of his mother with his putative father. The law of *England* must govern the present case. The Respondent, being born in *England*, was, by the law of *England*, an *English* subject. He became possessed by birth of all the rights which that law confers, and incurred all the consequences which followed from them. If the birth had occurred before the union of the two Crowns, he would have been an *English* subject, and might have been punished as a traitor had he taken up arms for the *Scottish* monarch. The law of domicile, which is not a head of law recognised by any *English* statute or *English* writer, would not have affected his condition. By the *English* law

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he bore the character of a bastard; he was “not only begotten but born out of lawful matrimony (*b*).” By the same law he was a natural-born subject of the kingdom (*c*). He could no more change the character of bastard thus impressed upon him, than he could have changed his allegiance. He was a natural-born subject of *England*, being born within the realm of *England*; and that rule arising from the place has but one exception, which is that of the children of ambassadors. Had he been born in *Calais*, he would for the same reason have been an alien. This is a principle of public law. But what did all parties consider his condition in private? How was he treated by Colonel *M'Douall*?—As a bastard. The repeated bonds given by Colonel *M'Douall* to the parish officers, show that the Colonel always treated the children of *Mary Russell* as bastards. It is said that that was done to conceal the marriage; but the same mode of speaking of *Mary Russell* as an unmarried woman continued throughout, even in the matrimonial contract which was executed in 1808, and where she is described as “*Mary Russell*, residing at *Penrith* in *Cumberland*, *South Britain*.” The character of bastard once acquired by the Respondent under the law of *England*, cannot be afterwards changed. If domicile could have anything to do with the matter, it is clear that the domicile of the mother of an illegitimate child is the only domicile that the *English* law could recognise. The law here recognises no relationship between the putative father and the illegitimate child, except for one single purpose, which does not affect this case. Then what was the domicile of the mother? *Mary Russell* at

(*b*) 1 Bl. Com. 454.

(*c*) Id. 366.

the time of the Respondent's birth held the situation of the Colonel's servant. The domicile of the master is not conferred upon the servant, except perhaps in the single case of an ambassador's servants. If the question of domicile is to be introduced here, then it is plain that a person's living at a particular place is *prima facie* proof of his being domiciled there; *Anandale Peerage* case (*d*). The probability arising from that circumstance may be rebutted by evidence, but only in that way. Try this case by that rule. Where was the domicile of the mother?—In *Chester* or in *Penrith*. Where even (if that could be at all important) was the domicile of the supposed father at the time of the birth?—In *Chester*. But his domicile cannot affect the question. The domicile which must govern the case, if domicile is to be resorted to, is that of the mother: it was that which fixed on the child an *English* character, and gave it all its rights, and imposed on it all its disabilities. If so, then the character thus fixed on the child by the law of *England* cannot be altered by the law of any other country whatever; *Story* on the Conflict of Laws (*e*). That author adopts (*f*) the doctrine of *Boullenois*, who says (*g*), “L’homme est partout de l’état, soit universel, soit particulier, dont sa personne est affectée par la loi de son domicile.” “Habilis vel inhabilis in loco domicilii, est habilis vel inhabilis in omni loco.” The character being fixed at the birth, by the law of the place of the birth, the place of the subsequent marriage of the parents is not important. The *Strathmore* case (*h*) shows that a marriage does not legitimate children previously born in *England*, so as to give them rights as

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(*d*) P. 161.

(*e*) C. 4, s. 106.

(*f*) C. 4. s. 51.

(*g*) Princ. Gen. 10. 18, p. 4. 6; and
Quest. Mixt. Disc. Prel. p. 20, pr. 11.

(*h*) 4 Wils. & Shaw, App. 89, n. 5.

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legitimate children in any part of the United Kingdom. That was a case in which the question was as to the heirship of a title. The heirship to land is governed by rules no less strict. *Story*, giving the result of the opinions of *Boullenois* and several other writers, says (i), “personal capacity or incapacity, attached to a party by the law of his domicile, is deemed to exist everywhere. Thus a minor or other person deemed incapable of transacting business *sui juris* in the place of his domicile, will be deemed incapable everywhere.” And a very strong illustration is added by *Story*, drawn from the laws of the United States. This is so according to the public law of all nations. The principle that the place of birth must govern the condition of the child, was fully recognised, and indeed distinctly asserted, by Lord *Brougham* in *Doe & Birtwhistle v. Vardill* (j); and his Lordship then goes on to declare that the status thus ascertained in the place of the birth, belongs to the child all over the civilised world. Then comes the case of *Rose v. Ross* (k), in which a Scotchman by birth settled here, and had connexion with a woman by whom he had a son; and he subsequently went to *Scotland*, with the child and the mother, and after a residence of 15 days he married her and then returned to *England*. In that case it was found by this House, reversing the judgment of the Court of Session, that the child was not entitled to the benefit of legitimation by the subsequent marriage of its parents. There is not one case in which a person born in *England*, and having at the time of his birth the character of illegitimacy stamped upon him, has been permitted to become legitimate by the subsequent marriage of his parents.

(i) C. 4, s. 65.

(k) 4 Wils. & Shaw, 289.

(j) *Ante*, Vol. II. p. 594.

On all these grounds, therefore, the judgment of the Court below must be held to be erroneous, and must be reversed.

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Mr. *K. Bruce*, on the same side:—It is impossible to see how the domicile of Colonel *M'Douall* can in any way influence the decision of this case. It may be true that the mere circumstance of a man being out of his own country does not change his domicile. But here in this case there was much more than that: the Colonel was resident in *England* for some years, and at that time he could only have a domicile of residence and not a domicile of estate, for he was not then the owner of *Logan*; he had no house in *Scotland*, his *lares* were not set up there, for his father still lived, and *Logan* was in his father's possession. The long residence even of a military man, in a particular country, gives him a domicile there. That is in effect the opinion of *Pothier* (*l*); and Lord *Thurlow*, in *Bruce v. Bruce* (*m*), expressly stated that “a person's being at a place is *primâ facie* evidence of his being domiciled there;” an inference which might be rebutted by proof, but must otherwise be taken as settled. Thus, he said, a person remaining in a foreign country after his necessary business there was at an end, afforded *primâ facie* evidence of domicile; which was not affected by a mere intention to return, but would become the settled domicile of the party if he should die before changing it. The same rule was adopted by Sir *John Nicholl* in *Stanley v. Bernes* (*n*), in the case of the will of an Englishman made in *Portugal* according to the *English* and not the *Portuguese* form. The delegates there held that the long

(*l*) Appendix, b. 50, art. 11,
 law 1, “De Domicilio Militis.”

(*m*) 2 Bos. & P. 230 n.

(*n*) 3 Hagg. Ecc. Rep. 436.

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residence of the testator showed that he must be taken to have been domiciled in *Portugal*, and therefore that the will was not available, as it was not made according to the *Portuguese* form. So that if even the domicile of the putative father could affect this case, it would leave the right of the Respondent in no better situation than at present. But the domicile of the mother must govern the case; and if it should be said that she is a minor, the answer is, that the civil law and the law of *Scotland* recognise the right of a minor to a choice of domicile; *Graham v. Erskine* (o), *Robertson on Personal Succession* (p), citing *Patterson v. Wallace* as the authority; and *Marshal v. M'Douall* (q). *Mary Russell* had therefore an *English* domicile at the time of the birth of her children. If so, the status of the children is undoubted. The condition of the mother at the time of the birth governs the condition of the child (r). Thus if she had been a slave at the time of the conception, but had become free before the time of the birth, the child would have been free. But the converse would not hold, that being excepted from the rule in favour of freedom. *Ulpian* is (s) to the same effect. That shows that the supposed conception of the Respondent in *Scotland* will not affect the case, the place of birth being that to which the law alone looks (t). Suppose this child had been born out of the *English* dominions, he would not have been entitled to inherit land here even though he could be proved to have been conceived here. Had he been legitimate, his birth here would have secured him that right of inherit-

(o) Hales, 860.

(p) P. 202.

(q) Lord Kilkerran, 348.

(r) Dig. Pand. b. 50, tit. 1,
law 3 & 4.

(s) Tit. 5, s. 8.

(t) Dig. Pand. b. 1, tit. 5, law
7, and b. 25, tit. 4, law 1, s. 1,
and b. 35, tit. 2, law 9.

ance. If so, it equally fixes on him the status of illegitimacy. The marriage, if any, took place in *England*. The law of *England* must, therefore, govern the status of the child. Suppose a man and woman crossed the *Tweed* for the purpose of marrying, but without any intention of staying in *Scotland*, and they did not stay there, but after a short visit returned to *England*: the children born here would be *English*, though the marriage was a *Scotch* marriage, and though even circumstances might show that the conception of the first child occurred in *Scotland*. *Hogg v. Lashley*(*u*), *Rose v. Ross*(*x*), and *Conty's* or *Du Quesnoi's* case(*y*), all show that the place of the birth is most material in fixing the status of the child. In the case of *Shedden v. Patrick* (*z*), the status of illegitimacy having been impressed on the child at birth by the law of an *American* state, in which, as in *England*, a subsequent marriage would not legitimate the children, the status thus impressed was held to be irremoveable, and the children were not allowed to succeed to a *Scotch* estate. *Warrender v. Warrender* (*a*) is an express authority of the highest kind to show, that though the wife may be an Englishwoman, yet if the domicile of the husband is clearly *Scotch*, and if the contract of marriage has reference only to *Scotland*, and is to be fulfilled there, the *Scotch* Courts, though such marriage was in form solemnised in *England*, may inquire into a charge of adultery with a view to dissolve the marriage. But it shows no more. It does

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(*u*) 6 Bro. P. C. 577; Rob. on Personal Succession, 418.

(*x*) 4 Wils. & Shaw, 289.

(*y*) Guessiere Journal des Principals Audiences du Parle-

ment, tom. 2, b. 7, c. 7; Burge Com. Col. & For. Law, 106.

(*z*) Fac. Coll. 1 July 1803, Morr. app. "Foreign," 6.

(*a*) *Ante*, Vol. II. p. 488.

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not affect this case. In *Merlin*(*b*) is an ancient case where a child was begotten in adultery, but was born after the marriage of its parents, and the question was raised whether it was legitimate or not. The Parliament of *Paris* held that it was legitimate, on the ground that the time of the birth must fix its condition. That rule has been adopted by all the tribunals of the civilised world, and it is decisive of this case. It settles the fact that this Respondent is an Englishman, and therefore in him the status of illegitimacy received at his birth is indelible. To adopt a different rule would be to decide that any child born under whatever circumstances, out of *Scotland*, can be legitimated by a subsequent marriage in *Scotland*. This House, which has been for years struggling to keep within the narrowest limits the mischievous principle of legitimation by subsequent marriage, will not adopt a different course, and give it the very alarming extension now demanded.

The *Attorney-general*, for the Respondent:—This case comes before the House with the opinion of nine of the consulted Judges in favour of the Respondent. It is not intended to rely on any marriage before 1808, though there is reason to believe that sufficient could be proved to show a marriage valid, according to the laws of *Scotland*, contracted before that time. The judgment of the Court below proceeded on the validity and the effect of the marriage of 1808, and that is sufficient to support the present claim of legitimacy. It is not denied by the Appellants that a valid *Scotch* marriage then contracted between parties on whom the *Scotch* law properly attached, would have conferred legitimacy

(*b*) Repertoire, vol. 17, p. 10.

on the Respondent. The whole therefore depends on the question of the law which is to govern the case ; or, as it is called, on the presumed indelibility of the status acquired at the time of the birth. But though a bastard here, the Respondent might become legitimate in *Scotland*. The general rule of law is in favour of legitimacy : the *English* law offers an exception. The Appellants have, therefore, to show that the exception necessarily attaches on this case : there is no ground for saying that it does. The *Scotch* law admits of an exception where the parties could not have contracted marriage at the time of the birth : that ground of exception does not exist here. The Respondent relies on the following facts in favour of his claim :—First, his father was born and domiciled in *Scotland*, and was to all intents and purposes a person subject to the *Scotch* law. Secondly, the mother was likewise subject to the law of *Scotland*. Thirdly, as a consequence of the two former propositions, the Respondent himself was at the time of his birth domiciled in *Scotland*. Fourthly, the marriage in 1808 was a *Scotch* marriage, and had all the effect of one : and fifthly, that the Respondent was *in utero* before the mother left *Scotland*.—As to the first point, it is clear that the father originally possessed a *Scotch* domicile, and there is no ground for saying that he lost it. He was heir to an entailed estate there, and he had taken a house which was kept up there while he continued in this country. After a military service of two or three years in this country, he returned to his establishment in *Scotland*, and was then returned one of the Members for the county of *Wigton*, and he continued to serve in Parliament till after the marriage. His domicile could not be lost, by his military service in this

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country, for domicile can only be changed *animo et facto*. For the same reason it could not be lost by his parliamentary services; *Warrender v. Warrender* (c). The house he afterwards took at *Penrith* was for the accommodation of his children, and of course he sometimes resided there, but during all this time his home was in *Scotland*. There he was domiciled in virtue of his property; there he had his household gods, and there was the centre of his affairs. All these circumstances show a *Scotch* domicile, and a subjection to *Scotch* and not to *English* law. The cases of *Bruce v. Bruce* (d), *Ommaney v. Douglas* (e), and Lord *Stowell's* decision in the case of the *Harmony* (f), do not affect the present, for in each of them there were acts which showed the suspension, not the destruction, of one domicile, and the creation of another. Similar reasoning will apply to the case of the mother. Her original domicile was undoubtedly *Scotch*, and she did nothing to lose it and acquire another. A servant who follows a master for a particular service, does not thereby lose his domicile of origin. She was *in itinere*; and by the effect of various *English* cases, where a person dies *in itinere*, his goods are not to be administered according to the law of the place where the death happened, but according to that of the place of the deceased's domicile. Had *Mary Russell* died in *October* 1796, her property would undoubtedly have been administered according to the law of *Scotland*. That shows that the child she then bore must be subject to the same law. Her afterwards living at *Penrith* being a matter of mere convenience, was not a forfeiture of her original domicile. Then it follows clearly that the third propo-

(c) *Ante*, Vol. II. p. 488.

(d) 6 Bro. P. C. 566.

(e) *Id.* 550 n.

(f) 2 Rob. Adm. Rep. 322.

sition is established, namely, that the Respondent at the moment of his birth was domiciled in *Scotland*. It may be admitted that the domicile of the putative father cannot be communicated at the birth to the illegitimate child, but it may be communicated by the subsequent marriage of the parents, and at all events the domicile of the mother is so communicated ; so that, if she still retained her *Scotch* character and domicile, it was at once acquired by her child. *Bell's Principles* (g). The Appellants themselves admit this principle. In their case (h) is this sentence, put forward as an argument by their counsel : “ Her children being illegitimate, follow her domicile.” If so, then it is clear that her domicile being *Scotch*, theirs was *Scotch* also, and in all respects they were subject to the operation of the *Scotch* law. The condition therefore impressed on the children by the foreign law to which it is thus admitted they were subject, is a condition which the *English* law will recognise ; *Rex v. Brampton* (i). The *Waldegrave Peerage* case (k). This brings the case to the fourth position, namely, that this marriage was a *Scotch* marriage, and had effect as such. It was so because both the parties were *Scotch*, and had a *Scotch* domicile. A marriage may be considered a *Scotch* marriage, though the form of celebration takes place in *England* ; *Warrender v. Warrender* (l). In this case, as in that, the intention of the parties had reference to a domicile in *Scotland*. *Story*, in his book on the Conflict of Laws (m), puts the question “ what is to be deemed the true matrimonial domicile ?” and answers it by showing, in the several succeeding sections, that it is the

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(g) P. 797.

(h) P. 23.

(i) 10 East, 282.

(k) *Ante*, Vol. IV. 649.

(l) *Ante*, Vol. II. p. 488.

(m) C. 6, s. 191.

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place where the parties intend to fix their residence, and not that in which, while *in transitu*, the marriage happened to be celebrated ; and he quotes all the most distinguished jurists in support of his opinion (n). That entirely distinguishes the present case from *Strathmore v. Bowes*, where there could be no doubt that the marriage was an *English* marriage : now it is not pretended that any but a *Scotch* marriage would have the effect of legitimating the children. The fifth position is one of fact, about which there can be no doubt. From that fact it follows that if the marriage in 1808 is, as it must be by the law of *Scotland*, referred back to the time of the conception, it must be treated as having occurred before the mother left her native country. A *Scotch* marriage will render legitimate all the children, wherever they were born, and the Respondent must on this view of the case be declared to be legitimate. No distinction can be taken on account of the place of birth of any of the children, for if any could be taken the most absurd consequences would follow. Could any such distinction be taken, then if one child was born in *Scotland*, another in *England*, and a third in *France*, the first and third would be legitimate and the second a bastard ; a piece of absurdity that could never be seriously contended for. The place of birth, therefore, can have no effect in determining the legitimacy. The question of allegiance cannot determine that of legitimacy ; the two things depend on distinct grounds. It is admitted that if a *French* ship was driven into *Dover* harbour, and while there a woman on board was delivered of a child, that child, though the vessel sailed from *Dover* within an hour afterwards, would be an *English* subject ; he might sit in Parliament,

(n) C. 6, ss. 192 to 199 incl.

be a member of the Privy Council, and hold real property. But that has nothing to do with legitimacy, which is a mere personal status, quite independent of state or political considerations, while on them alone is the law of allegiance founded. Besides, this law of allegiance, operating in the way now described, is peculiar to this country, and it depends, too, altogether on the place of birth, which legitimacy does not. It is said that illegitimacy once fixed on a person in *England*, is indelible. The expression is too general; it may be indelible in *England*, but it cannot be shown that a person illegitimate in this country, is incapable of being rendered legitimate all over the world. So far is that from being the case, that *Boullenois* and *Merlin* show that *English* bastards may be rendered legitimate in *France*. *Boullenois* says (o), “If after the birth of a child born in *England* of *English* father and mother, the father and mother were to be naturalised in *France* with their child, and they were afterwards to contract marriage, that child would be considered as rendered legitimate by such subsequent marriage:” and in another place he says, “I should consider it would be the same if the marriage had been contracted in *England*, provided that the father and mother were naturalised in *France* with their child.” In taking the opinion of M. *Merlin* on the case of *Rose v. Ross*, this question was put, “What in *France* is the status of a natural child born in *England* of an Englishman and Englishwoman, who have married in their own country after his birth?” and “what would be the status of that child if he was born not in *England* but in *France*?” The answer was, “The law which refuses to a subsequent marriage

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(o) Tom. 1, tit. 1, c. 2, obs. 4.

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the effect of legitimating natural children, is to be considered a personal law. Thus, it is true, is regulated the personal status of the individual, and the laws follow the individual whose status they regulate; and it is on this principle that the civil code declares that the law of the status follows a Frenchman residing in any foreign country. So it is impossible to consider in *France* a man to be legitimate, when his parents have been married in *England* after his birth: and it is that which decided *Boullenois* to give a similar answer to a similar question." He added, "it would signify a great deal that the father and mother were married in *England*." The following question was then put: "what in *France* is the status of a natural child of a Frenchman and a Frenchwoman who are married in *England* after its birth;" and then the same question with this difference, "who are married in *France* after the birth in *England*;" the latter being, in fact, the same question as that raised in the present case. The answer was, "the second question ought to be resolved on the same principles, respectively applied in the inverse sense. The child would be rendered legitimate in *France*." On the authority of these answers, it is clear that had the parents of the Respondent been *French* instead of *Scotch*, the Respondent would, under the circumstances which occurred in this case, have been legitimated by the marriage. What, then, is to make the difference? It is not true that the status fixed on an individual by the laws of a particular country is indelible. A Frenchman may be naturalised here; and though, as to *France*, he may not be permitted by its law thus to put off his country, yet as to *England* he acquires a new status, and in respect of it, new rights. The judgment here would

have been in favour of the Respondent if the Lord President had been of opinion that the mother was domiciled in *Scotland*. The Lord President was of opinion in favour of the legitimacy in the case of *Rose v. Ross*, on the ground that there had been no change of domicile : so that it being clear, as it is submitted to be, that here there was no change of domicile, but that the domicile of the mother continued *Scotch*, the learned Lord may be added to the rest of the Judges as in favour of the legitimacy of the Respondent, and the judgment appealed from becomes then an unanimous judgment of the Court below. On no merely doubtful ground of apparently conflicting laws will this House set aside such a judgment.

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The *Lord Advocate* (*Rutherford*), on the same side :—The Respondent has been legitimated by the effect of this marriage of his parents. They have completely fulfilled the two conditions which are requisite for rendering a subsequent marriage capable of conferring legitimacy on previously born children. In the first place, it is necessary that the parents should have been capable of marrying at the time of the conception, or of the birth of the child. In the next place, there must not have been any intervening marriage between the birth of the child and the marriage of the parents. This marriage being perfectly valid in both these respects, what is there to prevent its having its full effect in legitimating the Respondent ? It is said this must be considered an *English* marriage, and that the bastardy once impressed on a child in *England* is indelible. That is a strong expression, but it means nothing more than that, in *England*, a man who has been placed in that status is incapable of being removed from it by the effect of any proceed-

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ing under the *English* law, for the *English* law does not acknowledge a subsequent marriage as imparting a change in the condition of the child. But the *English* law itself recognises certain legal rights in a bastard, as in the case of the bastard *eigné*. In that respect it favours the bastard more than does the law of *Scotland*. But this is not in any respect an *English* marriage; it is a *Scotch* marriage, and must have all the incidents of one. The *Scotch* law allows the status of an illegitimate person to be changed by the act of his parents. Has that been done here? It has if the law of *Scotland* should be held to prevail. And it does prevail; for the law which must determine what are to be the consequences of the marriage, must be that of the domicile of the father, or that of the intended performance of the marriage contract; *Warrender v. Warrender* (p). Thus a *Gretna-Green* marriage between *English* parties is a good *English* marriage. The questions of alienage and allegiance have nothing to do with this case. It is said that the Respondent is a natural-born *English* subject, and therefore his birth and status must be determined on by the laws of *England*. But to make out the argument for this purpose it should be carried to this extent, that if born in *Scotland*, the Respondent would have been an alien. Such an argument is not, however, put forward. It could not be maintained for a moment. His allegiance is the same, and his citizenship the same, whether born on the north or south side of the *Tweed*. But his personal status as to certain civil rights may be different according to the place of his birth. If the Respondent was seeking anything from the *English* law, the rigid rules of that law might perhaps be

(p) *Ante*, Vol. II. p. 535.

applied to him. But he is not doing any such thing. He is seeking something from the *Scotch* law, and by that law his claims are to be decided. The Respondent has a right to go to the time of conception, in order to try the question by which of the two laws his status is to be decided.—[The *Lord Chancellor*: Are you aware of any case in which parties have been held to legitimate a child by their marriage, when that child must necessarily have been conceived at a time when the parties were not competent to marry? If you went back to the time of the conception, there might be an impossibility of their marrying.]—No such case is known; but if one such case should exist, it might be fairly argued that the parties were not compelled to go back to the time of the conception, for that that point is only to be considered with a view to the benefit of the child; and at all events no such objection exists here. It is not true, that because the child was born in *England*, his status is to be determined by the law of *England*. Even if treated as a bastard at the time of his birth, his status must be determined by the law of the country of his mother, and that country was *Scotland*. There is nothing here to show that she had any *animus* of giving up her native domicile and adopting any other; and she could not lose her domicile of origin except *animo et facto*. She was only staying in *England* for a temporary purpose. But even if it is possible to say that for a time she lost her *Scotch* domicile, it is beyond all doubt that she resumed it before the marriage, and her domicile at the time of the marriage is the only one that can affect the child. The law of *England* is, as it is admitted on the other side, silent on the question of domicile. Under such circumstances the case of

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Pottinger v. Wightman (q) shows that where the law of *England* is silent, the Courts will not refuse to look to the doctrines of civilians and canonists. But the law of *England* has nothing to do with this case, which is in fact to be governed by the law of *Scotland*. By that law it is clear that there has been a valid marriage of two persons competent to marry, and that that marriage has had the effect of legitimating their previously born children.

Sir *F. Pollock*, in reply :—This is not a question of inheritance, which is regulated by a particular law, but of personal status, which must be determined on much more general principles. The rule stated on the other side would go to this length; that if an Englishman and Englishwoman go to *Scotland* and settle there, and marry and die there, their children, wherever born, would be legitimate, for the marriage would be a *Scotch* marriage. What is a *Scotch* marriage? It is, even according to the other side, not simply a marriage had in *Scotland*, but a marriage had there by parties permanently residing in *Scotland*; or by parties who, marrying elsewhere, look to that country as the place where the marriage is to be carried into effect, and who may be said to be domiciled there. If that view of the matter is correct, there is no pretence for considering this as a *Scotch* marriage. There can be no good ground for saying that a marriage in fact celebrated in *England*, is by a fiction of law to be dealt with as a *Scotch* marriage, and to legitimate previously born children. If that could be done, any *English* issue born before the parents' mar-

riage would be legitimated, should those parents think fit to go to *Scotland*, and settle and marry there. This would afford an easy mode of evading the *English* law. This doctrine of legitimation by subsequent marriage is itself a novel one. It is not to be found in *Stair*, though he wrote so late as 1590; and in the *Regiam Majestatem* the law is expressly stated to be different, and this now prevailing doctrine is spoken of there with as much abhorrence as in the *English* statute of *Merton*. It first crept in by the bishops and the Commissary Court, under the authority of Queen *Mary*. Where then is the *consuetudo*, which, as the old settled law of a kingdom, is to have so much respect paid to it? If it really exists at all, it must be strictly confined to *Scotch* births and *Scotch* persons. So confined, it could have no operation in the present case; for here the birth and the form of marriage, such as it was, were both *English*. The civil law gave a bastard rights independent of the father. The *English* and the *Scotch* law refused to do this; and in that, as in many other things, such as the disposition of property by will, there was the greatest difference between the *Scotch* and the civil law. The one cannot, therefore, be universally cited as authenticating or justifying the other.

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The *Attorney-general*, interrupting the reply, asked leave to read the following passage from *Balfour's* *Practics* (r), in order to show that at the time of the publication of that work, the doctrine of legitimation by subsequent marriage was well known in *Scotland*, and the mode of proceeding in the Courts settled:

(r) P. 239, s. 9.

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“ If any children be begotten and born between ane man and ane woman, not being at that time joined in the bands of marriage, and thereafter it shall happen that the same man shall lawfully marry the same woman, the bairns begotten and born before the completion of the same marriage are made lawful, and may sue as right heirs to their parents. And if any controvert or question whether they were begotten or born before the completion of the said marriage, the same shall be discussed before the Spiritual Judge, as is immediately before said of bastardy.”

Sir *F. Pollock* continued :—That quotation proves the previous assertion. The law was introduced by the Spiritual Judges. It must of course be taken, on *Balfour's* authority, that such was deemed to be the law at that time. That was in the time of Queen *Mary*, who had directed this law to be administered by the bishops. Still it is curious that it is not found in the subsequent authority of Lord *Stair*. The question of domicile is as little known in the *Scotch* as in the *English* law: in both it has only been recently introduced, and introduced for certain purposes. It has not been borrowed from the civil law: it could not exist there, for the universality of the *Roman* empire prevented such a doctrine from being of any importance. The argument respecting allegiance has not been fairly met. It was put on the supposition of a case like this arising before the union of the two Crowns. In such a case it is clear that birth here would constitute the child an *English* subject, and his status would in all respects be settled by the *English* law. In *Rose v. Ross*, Lord *Lyndhurst* said, “It is sufficient that the child should have been born in a country in which illegitimacy is indelible;

no subsequent marriage could render him legitimate.”
If that principle should not be adopted, if any rule
to ascertain the status of a person should be allowed
besides the intelligible rule of the place of his birth,
the greatest confusion will be introduced into the
law, and every case will be made to depend on the
doubtful issue of various and conflicting laws.

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Judgment postponed (s).

(s) The case immediately following was argued about the same time; and as it involved the same points of law (though the facts in the two cases varied from each other), both were considered and adjudicated upon together. The judgment in both will be found at the conclusion of the arguments in the next case.

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23, 24. 26. 30.
August 10.

MARY SEYMOUR MUNRO - - - *Appellant.*

GEORGE MUNRO, and CHARLES }
MUNRO his Son - - - - } *Respondents (a).*

Domicile.
Legitimation.
Marriage.

A *Scotch* gentleman of rank and fortune left *Scotland* in 1794, and came on a visit to *London*. In the course of that year he became acquainted with an *English* lady. In 1795 he took lodgings for her in *London*, where, in 1796, a child, the fruit of their intercourse, was born. He then took a house on lease and furnished it, and continued to reside in that house with her till 1801, unmarried. In *September* of that year he married her in an *English* church. In 1802 he returned to *Scotland*, taking with him his wife and child, and settled himself in his patrimonial mansion. During the whole period of his residence in *London* he had been accustomed to write letters to *Scotland*, declaring from time to time his immediate intention to return, and desiring things to be done which could only be necessary on that account.—HELD, that he had not lost his *Scotch* domicile, and therefore that his marriage was in all respects a *Scotch* marriage, and his child capable of succeeding as his lawful heir to entailed estates.

THIS was an action of declarator of legitimacy, brought by the Appellant for the purpose of establishing that she was the lawful daughter of Sir *Hugh Munro*, of *Fowlis*, bart., and as such the heiress of entail entitled to succeed to the estates of *Fowlis*. Sir *Hugh* held those estates under an entail to him and the heirs male, and failing heirs male, then to the heirs female of his body. The Respondents, in the event of failure of heirs of the body of Sir *Hugh*, would succeed to the estates. Sir *Hugh Munro* succeeded on the death of his father, in 1781, to the estates at *Fowlis*, and to the dignity of a baronet, but was then under age: he attained his full age in 1784. He took an active share in the management

(a) See the head notes to *Dalhousie v. M' Douall*, ante, p. 817.

of his own estates, and was frequently an attendant at the sittings of the town council of *Fortrose*, to which he was admitted a member soon after becoming of age. In 1785, 1787, and 1788, he visited the Continent, but always returned to *Scotland*, where he resided, not at the family mansion, *Fowlis Castle*, but at *Ardullie*, a house belonging to his mother. He resided with her till 1794, when, in consequence of some differences with her, he left *Scotland* professedly on a short visit to *London*. In *November* of that year he became acquainted with a Miss *Mary Law* in *London*, and an attachment arose between them. In *October* 1795, her pregnancy being declared, he took apartments for her in *Balover-street, Oxford-street*, where, on the 14th of *May* 1796, the Appellant was born. He afterwards took a house on lease in *Gloucester-place, Portman-square*, where he and Miss *Law* resided together till 1801. In *September* of that year he married her at the parish church of *St. Mary-le-bonne*, according to the form of the ritual of the church of *England*. He continued to reside in *London* for some months after his marriage, but then broke up his establishment in *Gloucester-place* and went to *Scotland*, and there introduced his wife and daughter to his friends and connexions. In *August* 1803, Lady *Munro* and two female attendants were drowned while bathing on the shore near *Fowlis Castle*. As some rumours had been raised of the legal incapacity of Miss *Munro* to succeed as heiress to the entailed estates, the suit for declarator was brought to determine that question. The conclusion of the summons was, that “it should be found and declared that the pursuer, the said Miss *Mary Seymour Munro*, as lawful daughter, and at present only lawful child, of the said Sir *Hugh Munro*, is entitled,

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failing her said father and heirs male of his body, to succeed to the estate of *Fowlis* and others, in virtue of the clause of destination and other clauses in the entail aforesaid ; and that she has a vested interest therein, and *jus crediti* over the same, as heir female procreate of the body of Sir *Hugh Munro*." The Lord Ordinary (*Corehouse*) reported the case to the Lords of the First Division of the Court of Session, by whom the other Judges were consulted. In this, as in the preceding case, the Lord President thought that the domicile of the father had nothing to do with fixing the status of the child ; but he was also of opinion, that if it had, then the domicile was altogether *English*, and therefore the child was indelibly impressed by the law of *England* with illegitimacy. Six of the other Judges thought the child legitimated by the subsequent marriage, on the ground that the domicile of the father was *Scotch* ; six others thought the domicile was *English*, and therefore that the Appellant was illegitimate. In accordance with the opinion of the majority of the Judges, a decree was pronounced relieving the defenders (the Respondents) from the conclusions of the libel. This was the decree now appealed from.

Mr. *Pemberton*, for the Appellant:—The arguments here will be confined as much as possible to those points in which this case differs from that of *Dalhousie v. M'Douall*, and to those which the discussion in that case has suggested. The first distinction between the two cases is to be found in the conclusion of the summons, which in the present case does not seek for a declarator as to the status of the Appellant, but, according to the terms of the entail, prays that she may be declared entitled, as *persona designata*,

as immediate heir in succession after the death of Sir *Hugh*, to the estate of *Fowlis*. If by the *Scotch* law the Appellant is the heir of Sir *Hugh Munro*, she is entitled to have the judgment of the Court below reversed, and the declarator directed to be in her favour. The question of the domicile of Sir *Hugh Munro*, at the time of the birth of the Appellant and at the time of his marriage, is most important. All the circumstances here show it to have been a *Scotch* domicile. Six of the Judges were of opinion that it was an *English*, six that it was a *Scotch* domicile; but all twelve agreed, that if the domicile was *English*, Miss *Munro* was not entitled; if it was *Scotch*, she was entitled to the declarator prayed for. The thirteenth Judge, the Lord President, was of opinion that domicile had nothing to do with the matter, which must be decided by the place of the birth of the child, and that that being *English*, the status of illegitimacy had indelibly attached itself to her. This case therefore is unprejudiced by anything which has occurred in the Court below; and if this House should be of opinion that the domicile was *Scotch*, the course will be to affirm the judgment of the twelve Judges who thought that that would of itself entitle the Appellant to the declarator which she sought to obtain. It may now be assumed, for the purposes of this argument, that the place of the marriage is immaterial. The foundation of this Appellant's title is the domicile of Sir *Hugh Munro*, her father. If that is *Scotch* she is entitled to what she asks. The principle is laid down very clearly in the case of *Somerville v. Somerville (b)*, where it was held that the mere place of birth or death does not constitute the domicile, the

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domicile of origin; which arises from birth and connexions, remaining until clearly abandoned and another taken. The Master of the Rolls there said (c), "The third rule I shall extract is this, that the original domicile, or, as it is called, the *forum originis*, or domicile of origin, is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile." In *England*, the domicile of a family follows that of the father; his domicile is that of his family. We propose here to show by the evidence that Sir *Hugh* was clearly by domicile of origin *Scotch*; that he retained that without interruption or doubt until 1794; that when he left *Scotland* in that year he did so with no intention of abandoning his *Scotch* domicile, but merely to pay a visit, as any other gentleman might do, to another country, and to return at the end of his visit; that though he remained in *England* from 1794 to 1802, he had never any intention of abandoning his *Scotch* domicile, but looked on himself and required others to look upon him as a person who was temporarily absent from his home, but who, though constantly prevented from executing his intention, had the most settled intention of speedily returning to it. On attaining his full age in 1784, the first thing he did was to make use of his newly-acquired power, in order to sever the only tie he had with *England*. He had succeeded to the estate of *Woodlands* in *Dorsetshire*; his father got that estate through Sir *Hugh's* grandmother. His father died indebted. The *Scotch* estates were equally liable with the *English* estates to the payment of those debts;

as immediate heir in succession after the death of Sir *Hugh*, to the estate of *Fowlis*. If by the *Scotch* law the Appellant is the heir of Sir *Hugh Munro*, she is entitled to have the judgment of the Court below reversed, and the declarator directed to be in her favour. The question of the domicile of Sir *Hugh Munro*, at the time of the birth of the Appellant and at the time of his marriage, is most important. All the circumstances here show it to have been a *Scotch* domicile. Six of the Judges were of opinion that it was an *English*, six that it was a *Scotch* domicile; but all twelve agreed, that if the domicile was *English*, Miss *Munro* was not entitled; if it was *Scotch*, she was entitled to the declarator prayed for. The thirteenth Judge, the Lord President, was of opinion that domicile had nothing to do with the matter, which must be decided by the place of the birth of the child, and that that being *English*, the status of illegitimacy had indelibly attached itself to her. This case therefore is unprejudiced by anything which has occurred in the Court below; and if this House should be of opinion that the domicile was *Scotch*, the course will be to affirm the judgment of the twelve Judges who thought that that would of itself entitle the Appellant to the declarator which she sought to obtain. It may now be assumed, for the purposes of this argument, that the place of the marriage is immaterial. The foundation of this Appellant's title is the domicile of Sir *Hugh Munro*, her father. If that is *Scotch* she is entitled to what she asks. The principle is laid down very clearly in the case of *Somerville v. Somerville (b)*, where it was held that the mere place of birth or death does not constitute the domicile, the

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domicile is acquired, as expressed by *Pothier* (i), “par le concours de la volonté et du fait;” that having been once acquired, it may be retained by intention, without actual residence; that residence alone, however long, will not acquire it; but that, however short that residence, domicile may be acquired if the intention to acquire it is clearly manifested. All these positions were fully shown in *Van Leuwen’s* case (k), referred to by Mr. *Burge* (l). He was a citizen of *Utrecht*, who resided for ten years, from his fourteenth to his twenty-fourth year of age, in *Spain*, whither he had been sent to trade, but he did nothing to show an intention of acquiring a domicile there. On his return he took a room in *Utrecht*, and performed certain things required by the custom there to constitute citizenship; but he did not permanently live there, and he died intestate in *Amsterdam*. It was held that his property must be distributed according to the laws of *Utrecht*, in which he was to be considered as domiciled at the time of his death. On the same principle, a marriage celebrated at *Smyrna* between a *Dutchman*, who held the office of *Dutch* consul there, and resided at that place for a great many years, was held to be regulated in its consequences by the law of *Amsterdam*, his residence at *Smyrna* not having put an end to his domicile of origin (m). The case of Madame *Justina Gunterroth* (n) was decided on the same ground that residence of any length would not acquire a domicile *nisi voluntas et animus accesserit*. A change of domicile is not easily to be presumed, says *Voet* (o); and

(i) Intr. Gen. au Cout. p. 4.
 (k) Respons. Juris. Holt, pt. 5, cons. 85.

(l) Comm. C. & F. Laws, vol. 1, p. 42.

(m) Nieuw Nederlands Advys

Boek, vol. 1, p. 165; Appendix to Henry’s Report of *Odwyn v. Forbes*.

(n) Carpzovius, bk. 6, tit. 4, resp. 38; Burge, vol. 1, p. 50.

(o) Bk. 5, l. 99.

the same author there expresses in the clearest manner what will constitute a domicile. “*Illud certum est neque solo animo, neque destinatione patris familias, aut contestatione sola, sine re et factæ domicilium constitui: neque sola domus comparatione in aliqua regione, neque sola habitatione sine proposito illic perpetuo morandi.*” And the general definition of a domicile is given by the same author as the place where a man “*larem rerumque ac fortunarum suarum summam constituit:*” a definition at once the most expressive and the most exact, and one which has ever since been recognised as authoritative by all the tribunals of the world. *Vattel* (*p*) has expressly adopted it. If these authorities establish, as it is submitted they do, that the mere leaving home for however long a period will not, without the intention to change the domicile, have that effect, then it is submitted that Sir *Hugh*’s residence in *England* did not affect his domicile, but that it all the while continued to be *Scotch*. The evidence in this case does not justify, it contradicts, the assumption of any such intention. Then what is the effect of the domicile on the question of legitimacy? It is an admitted principle that a *Scotch* marriage will legitimate previously born children. What is to prevent the application of that principle in the present case? certainly not any loss of *Scotch* character by a change of domicile. The authorities already quoted abundantly show that there has been no change of domicile in this case. But then it will be said that the marriage was contracted in *England*, and consequently cannot have the effect of a *Scotch* marriage; then that the mother was at the time of the birth domiciled in *England*, and that

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(*p*) Bk. 1, c. 19, par. 217.

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the child, being then illegitimate, must follow the domicile of the mother; and lastly, that the birth took place in *England*, and consequently that the status of illegitimacy was thereby indelibly impressed on the child. But the great answer to all these arguments is, that the husband was a domiciled Scotchman; that the marriage was therefore a *Scotch* marriage, and being so, that all the incidents of a *Scotch* marriage attached upon it. One of the great incidents of such a marriage is to legitimatise children by having relation to a period antecedent to the birth, so that the marriage is considered to have taken place (there being no lawful impediment to the marriage) before the birth of the child. The rule is, “*Retrotrahitur ad tempus nativitatis liberorum, ut sic taliter legitimati, ab initio legitime nati censeantur (q).*” In that rule no restriction exists as to the place of the birth or the domicile of the mother. The only qualification which this rule of law admits of, is that of a previous impediment so well known in the law of *Scotland*, but which need not be considered here because no one pretends that it existed. The effect of this *subsequens matrimonium* in legitimatising the children is so great that a grandson will have the benefit of the legitimacy of his father, conferred by the marriage of the grandfather and grandmother even after the father’s death. That was a principle of the civil law (*r*), and the law of *Scotland* has adopted that principle to its fullest extent (*s*); *Craig* says (*t*), “*Legitimos vocamus, qui in concubinato nati, justis nuptiis inter utrumque parentem postea sequentibus; et jure, hi*

(*q*) Cod. de Nat. lib. 5, tit. 27, l. 10.

(*r*) Voet, lib. 25 tit. 7, de Concub. n. 7.

(*s*) Balfour’s *Practics*, tit. Bastard, folio edit. p. 239.

(*t*) Bk. 2, Dig. 13, s. 16.

legitimi censentur: * * * tanta enim vis est matrimonii subsequentis, ut de priori delicto inquire non sinat, et illud omnino tollat, et purget." Several other eminent *Scotch* law writers adopt this opinion(u). The exceptions to this otherwise universal rule arise out of incest and adultery. Such being the law of *Scotland*, it is binding on all *Scottish* subjects, and conclusive as to their rights. The respect which is due to the principles of the *Scotch* law, however they may be opposed to *English* notions of law, has been clearly asserted in this House in the case of *Birt-whistle v. Vardill* (x): "It is not more alien to the *English* law to adopt the fiction that such children are born in wedlock, than it is alien to the *Scotch* law to exclude that principle. The *English* rule being statutory can make no difference. A fixed and known principle of common law has exactly the same force as a statutory provision." But then it will be said that the fact of the marriage having taken place in *England* makes a great difference in this case. It is not denied that there are some *dicta* to be found in the cases of *Shedden v. Patrick* (y), and *Strathmore v. Bowes* (z), and *Ross v. Rose* (a), which do seem to render that matter of importance. But they are merely *dicta*. And after the case of *Warrender v. Warrender* (b), it cannot now be doubted that the right to inquire into alleged adultery with a view to dissolve a marriage had in *England*, the lady being an *English* lady, is possessed by the Courts of the country in which the husband's domicile is, and where

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(u) Bankton, b. 1, tit. 5; Ersk. b. 1, tit. 16; Spottisw. Bastardy, p. 27. (z) 4 Wils. & Shaw, App. 89, n. 5.
(x) *Ante*, Vol. II. p. 593. (a) 4 Wils. & Shaw, 289; Fac. Coll. 15 May 1827.
(y) Dict. Dec. "Foreign," App. n. 6, 1 July 1803. (b) *Ante*, Vol. II. p. 488.

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the contract of marriage was intended to be performed. It was so decided on the ground that, in contracting a marriage, the wife acquires the domicile of the husband. Domicile in all these cases rules other considerations. There is no one decision that depends on the mere place of the marriage or that of the birth. In the cases of *Conty du Quesnois* (c), *Shedden v. Patrick* (d), *Strathmore v. Bowes* (e), *Rose v. Ross* (f), and in *Warrender v. Warrender*, where all the previous cases were considered, everything was made to depend on the question of domicile.

There is no such thing as the indelibility of illegitimacy: not even in England does that indelibility exist. It may, for instance, be at once removed by an Act of Parliament. It cannot, therefore, be indelible, since an Act of Parliament may make a bastard legitimate in *England*, as a subsequent marriage will make him legitimate in *Scotland*. Nor is there any valid argument to be drawn from the supposed doctrine of allegiance: for taking the statements in the books as to allegiance to be conclusive, still it is clear that the distinction between allegiance and domicile is very great. The first can never be put off; the other can be put off and resumed at pleasure: the first depends on a principle of state policy, which is unalterable; the next depends on the sole exercise of the will of the individual. The rule of domicile must govern this case, and it must most especially do so since the subject-matter of the litigation is the title to real property, which depends entirely on the *lex rei sitæ*. The municipal law of *Scotland* is therefore that which

(c) Guessiere, Journ. des Princ. Aud. des Parl. tom. 2, b. 7. c. 7; Burge Comm. Col. & For. Laws, 106.

(d) Dict. Dec. "Foreign," App. n. 6, 1 July 1803.

(e) 4 Wils. & Sh. App. 89, n. 5.

(f) 4 Wils. & Shaw, 289.

can alone be applied to the case; and the Appellant being fully brought within the operation of that law, she is entitled to be declared the lawful heir of entail.

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Sir *W. Follett*, on the same side:—It is true that the word domicile has not been found in any of the writers on *English* law; but that does not show that *English* law would not admit the doctrine of domicile and its consequences, when properly presented as a subject of adjudication, but merely that our law writers have hitherto confined themselves to the municipal law of their own Courts. *Munro v. Sandhurst* (g) may be added to the cases already cited as decided on the question of the domicile of the party. *Boullenois* (h), after observing that, where the laws of a kingdom allow a bastard to be legitimated by a subsequent marriage, as in *France*, his legitimacy thus lawfully acquired in his own country must be recognised by all other nations; or if the law of his own country does not allow of this legitimation, as in *England*, his continued illegitimacy must in like manner be recognised; proceeds to say, “J’applique encore cette decision à un enfant Anglois, né en Angleterre d’un concubinage, et dont le père et la mère seroient venus demeurer en France, et y auroient maries sans s’y être faites naturaliser, parceque étant veritablement étrangers, et comme tels soumis aux lois d’Angleterre, leur enfant ne peut pas être, suivant ces lois, batard en Angleterre de naissance, et être regardé comme légitimé en France parcequ’il porte partout l’état et la condition dont il est par les lois de sa nation.” And this opinion has been completely adopted by *Merlin* (i). In this passage it is

(g) 6 Bli. 478.

(i) Tit. Legitim, sect. 2, para.

(h) Tom. 2, tit. 2, c. 1, obs. 11, p. 865.
22, p. 10.

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clear that *naturaliser* may be taken as synonymous with domiciled; the condition of the parties at the time of the marriage, and not the mere locality of the marriage, being that which is to govern the case. And to show this the more strongly, he adds, that the naturalisation must be before and not after the marriage, for otherwise it will produce no such effect. That the place of the marriage cannot affect the question, but that the domicile of the parties must decide, is manifest. Try it by this test:—An Act exists in this country to declare the marriage of a man with his deceased wife's sister void. Suppose, after the passing of that Act, two such persons were to go to *France* for the purpose of being married, such a marriage not being forbidden in *France*, and should there marry and a child should be born, by the law of *France* that marriage would be legal and that child legitimate. Would the child be legitimate in *England*? By the law of this country the disability is permanent, and the marriage would have no effect. In this country, therefore, it is clear that the child would be illegitimate; and it would be so because the parties marrying were domiciled in *England*, and the marriage (except for the mere question of the due observance of the forms required by the law of *France*) would therefore be an *English* marriage. The solution of these questions, if referred to domicile, is plain and easy; if put on any other ground it would be most confused and difficult. On the ground of domicile, 12 out of 13 Judges have decided that this Appellant is entitled, if in fact her father was domiciled in *Scotland*. It is that question as to where he was domiciled that alone created doubts in their minds. The other important question then is, as to the fact of the domicile. That domicile was

Scotch. It was not changed by the residence in this country of Sir *Hugh Munro*. That was his domicile by birth, and all the authorities show that that is to be presumed to continue till the contrary is shown. *Denisart* and *Pothier* (*k*) lay down this principle, and Mr. *Burge* (*l*) cites a number of other authorities, all in support of this proposition. *Warrender v. Warrender* (*m*) is the strongest case which can be imagined in support of this doctrine of domicile. There the marriage took place in *England*, the lady was an *English* lady, the husband resided for years in *England* and was Member of Parliament for an *English* borough, and yet his domicile of origin was held not to have been lost, and in virtue of that domicile the *Scotch* Courts were held by this House entitled to inquire into a cause alleged for the dissolution of the marriage. The *English* authorities, agreeing with foreign writers, show that the question of domicile depends on the mind of the person. In *Stanley v. Bernes* (*n*), Sir *J. Nicholl* declared that there must be a residence *sine animo revertendi*, in order to change the domicile of origin. How strong must be the circumstances establishing that animus may be seen in that case. There the party had left this country and resided in *Portugal* for 56 years; he renounced his religion and became a Roman-catholic; he married and had a son in *Lisbon*; he asked for admission to *Portuguese* allegiance, and got it, and was treated by the *French* in 1808 as a natural-born subject: yet even in his case it was doubted whether he had done that which showed a determination to change his domicile of origin. The same principle

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(*k*) *Denisart*, tit. Dom. s. 11;
Pothier, Cout. D'Orleans, c. 1, s. 7.
(*l*) 1 Com. Col. & For. Laws, 40.

(*m*) *Ante*, Vol. II. p. 488.
(*n*) 3 Hagg. Ecc. Rep. 437.

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was adopted in what is called the *Annandale* case, *Bempde v. Johnson* (o); and all these cases, with many others, were referred to in *Somerville v. Somerville* (p), which was itself founded on the previous decisions in this House of *Ommaney v. Bingham* (q), and *Bruce v. Bruce* (r), and that case was followed by *Curling v. Thornton* (s); so that it is difficult to conceive a more continuous course of decisions establishing any one point of doctrine. It may therefore be assumed that every presumption is to be made in favour of the domicile of origin. Secondly, that no change of it can occur without an actual residence in a new place, and an intention to fix a residence permanently there: and thirdly, that no new domicile can be acquired without a clear intention of abandoning the old. These two last propositions completing the doctrine of change *animo et facto*. Now it cannot be pretended that any one of these circumstances exists here. If this was the case of a *Scotchman* in ordinary circumstances in life, without any property, or anything at all beyond the mere circumstances of parentage and birth to connect him with the country, there would not be sufficient to show that there had been any change in his domicile: but when it is recollected that he was a gentleman of fortune and rank; that his fortune was in *Scotland*, that his rank was altogether *Scotch*, that even his personal property was in *Scotland*, and that his money was in a *Scotch* bank; that all his connexions were in that country; that his *domus mansionalis* was there, and that from time to time, almost from day to day, during his continuing here, he was directing alterations with regard to that

(o) 3 Ves. 198.
 (p) 5 Ves. 750.
 (q) 6 Bro. P. C. 560.

(r) Id. 566; and 2 Bos. & P. 229 n.
 (s) 2 Add. Ecc. Rep. 6.

mansion, and fitting it for his permanent residence,—no one can doubt that his domicile of origin remained ; and that there existed neither the fact of his having a settled residence in this country, nor his intention to have one, and to abandon the land of his birth. Under these circumstances, the law to be administered in the case is *Scotch* ; and by that law it is clear that his marriage was a *Scotch* marriage, and that his daughter is the lawful heir to his entailed estate.

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Mr. *Knight Bruce*, for the Respondent :—Fortunately there is no dispute as to the facts of this case, so far as the marriage and the birth of the Appellant are concerned. The domicile of the mother is not in question, so that as far as that is concerned the domicile of the child at the time of birth was *English*. With these facts settled beyond dispute, the question is, whether this case is distinguishable from those of *Shedden v. Patrick* (*t*), *Strathmore v. Bowes* (*u*), and *Rose v. Ross* (*x*). These three cases were all decided in this House, and are therefore binding authority not only on the Courts below, but on this House itself. The case of *Rose v. Ross*, is very strong in favour of the Respondent. The man there was a native of *Scotland*. He had a child born to him in *England* ; it was illegitimate ; he brought the mother of the child to his own country, *Scotland* ; he stayed there 15 days before he married her, he then had a lawful marriage celebrated ; he remained in *Scotland* some time after the marriage, and then returned to *England*. This House, sitting as a *Scotch* Court of Appeal, decided that the child of parents who were thus married,

(*t*) Dict. Dec. "Foreign,"
 App. n. 6, 1 July 1803.

(*u*) 4 Wils. & Sh. App. 89, n. 5.

(*x*) 4 Wils. & Sh. 289 ; Fac.
 Coll. 15 May 1827.

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though married in *Scotland*, could not succeed to *Scotch* landed estate. If that case cannot be distinguished from the present, there is an end of the Appellant's argument. But it is said to be distinguishable on the ground that the marriage in *Rose v. Ross* was *English*, but that the marriage in this case, though actually taking place in *England*, was in law a *Scotch* marriage. On what is that argument based? On the assertion that at the time of the marriage Sir *Hugh Munro* was in law, though not in fact, domiciled in *Scotland*. This assertion cannot be supported. The domicile of origin of Sir *Hugh Munro* is not denied; but he had lost it by a long residence on the Continent and in *England*.—[He referred at considerable length to the evidence and to the letters written by Sir *Hugh Munro* while in *England*.]—If, therefore, domicile was to govern this case, the domicile was *English*, and not *Scotch*. But the mere fact of a man's domicile has alone no effect on a case like the present. Connected with other things it becomes of importance; and when it is found that here Sir *Hugh Munro* passed the greater part of his life absent from *Scotland*, it is clear that the inferences sought to be drawn from expressions in his letters are much overcharged, if indeed they are at all justified. It may not be improper, with regard to those inferences, to remark that if some of the expressions in the letters indicate an intention to return to *Scotland* (an intention that, however frequently expressed, was left for years without even an attempt to carry it into execution), there are others which speak of the journey to *Scotland* as he might have spoken of a journey in the summer to *Brighton* or to *Cheltenham*. Thus, for instance, in one he deliberately speaks of the discomforts of "a tour" in *Scotland*, and in another he says

that he shall make "a jaunt" thither. These expressions indicate a feeling that his home was elsewhere than in *Scotland*, and they are the more important since they are in accordance with his conduct; while those relied on by the other side are altogether opposed to it. It is likewise to be remarked that up to the period of his marriage, though he was frequently writing to *Scotland*, he had not a house fit to receive him there. That circumstance, if intention is to be relied on, is a strong indication of intention, and in a very marked manner distinguishes this case from that of *Warrender v. Warrender (y)*, where the husband not only had a mansion in *Scotland* befitting his rank and fortune, but frequently went thither, taking his wife and family with him, in the intervals of public business. The letters of Sir *Hugh*, so much relied on, are the ordinary letters of a careful man of business, who was fond of giving the most particular directions to his agents, and not unfrequently stimulated their attentiveness by the declaration that he was coming down to see the progress of the matters which were the subjects of his directions. The same conduct is pursued by Englishmen who have large estates in *Ireland* which they never visit in the course of their lives, but about which they are incessantly writing directions and orders to their agents. No one would affect to say that the fact of their possession of property in *Ireland* makes them domiciled Irishmen. If intention is to be taken as fixing domicile, then it must be admitted that conduct is the best evidence of the existence of intention; and tried by that test, it is clear that the intention of Sir *Hugh*, up to the time of his marriage, was to live in *England* as an Englishman. Every time he declared that he should go to

(y) *Ante*, Vol. II. p. 488.

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Scotland, and yet delayed carrying that intention into effect, he gave by the very declaration and the delay to execute it a fresh proof of his preference of an *English* residence. The reason for his keeping a *Scotch* banker is shown in one of his letters, in which he uses these words: "Procure me a 500*l.* credit on that one of the *Scotch* banks which shall appear to you most liberal in dealing." He was a sharp man of business, and dealt with the *Scotch* banks because he thought his doing so was to his own advantage.—[The learned counsel again referred to the letters.]—What is the result of all these letters? They show, combined with the conduct of Sir *Hugh*, an intention to remain and be settled in *England*. The cases, then, of *Somerville v. Somerville*, *Bempde v. Johnson*, *Balfour v. Scott*, and *Bruce v. Bruce*, do not apply for the purpose for which they were cited for the Appellant: but they do apply for the Respondent, and *Balfour v. Scott* (z) is strongly in point here. That was a case of a *Scotchman*, a great landed proprietor, who like Sir *Hugh Munro* had dismantled his house, and had lived for years in *London*; and there, though exactly the same arguments which have been used here were applicable, and were applied to his case, he was held to be domiciled in *England*. In *Curling v. Thornton* a) the question of domicile never was decided. The decision there merely was as to the sufficiency of a responsive allegation, and the *dicta* thrown out, however entitled to respect, have no authority, since they did not amount to a judicial decision. The decision in fact amounted only to a recognition and application of that principle which the supreme legal authority in

(z) 6 Bro. P. C. 550.

(a) 2 Addam, Ec. Rep. 6.

this country had clearly laid down, that an Englishman is not entitled, by acquiring a foreign domicile, so far to throw off his country as to dispose of his *English* property by a will otherwise than in the *English* form; and that the Courts here cannot reject a will made by an Englishman in the *English* form, merely because it is made in a foreign country. The principle really deducible from that case is in favour of the Respondent; for it amounts to this, that wherever an *Englishman* is domiciled, his will must be dealt with as the will of an Englishman. The same learned Judge, in *Stanley v. Bernes* (b), upon exactly the same principle, gave effect to two codicils made in *Portugal* by an Englishman, good in their form and attestation, according to the *English* law, though bad according to the *Portuguese* law, and though it was there admitted that the testator had in fact resided for years in *Portugal* (c). These cases show that domicile has not the force attributed to it by the Appellant. In *Bruce v. Bruce* (d), an Englishman went to *India*, with the intention of returning here; but as he had only an indefinite hope of returning, that did not affect the question of domicile. Lord *Thurlow* there said (e), “The true ground on which the case turned was the deceased being domiciled in *India*. He was born in *Scotland*, but he had no property there. A person’s origin, in a question of “where is his domicile?” is to be

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(b) 3 Hag. Ecc. Rep. 447.

(c) But this decision was reversed by the Delegates, 3 Hag. 465. These two codicils had been made with a view to pass *English* property. The testator had executed a will and codicils in the *Portuguese* form, to dispose of his *Portuguese* property. Unfortunately, the reasons of the Delegates are not given, and the manner in which the case was viewed by them does not appear.

(d) 6 Bro. P. C. 566; 2 Bos. & Pul, 229 n.

(e) 2 B. & P. 230 n.

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reckoned but as one circumstance in evidence, which may aid other circumstances: but it is an enormous proposition that a person is to be held domiciled where he drew his first breath, without adding something more unequivocal. A person's being at a place is *prima facie* evidence that he is domiciled at that place; and it lies on those who say otherwise to rebut that evidence." This question of domicile came especially under the consideration of Sir W. Scott, in the case of the *Harmony*, and there that learned Judge made the following most important remarks (*f*):—"Of the few principles that can be laid down generally, I may venture to hold that time is the grand ingredient in constituting domicile. I think that hardly enough is attributed to its effects: in most cases it is unavoidably conclusive. It is not unfrequently said, that if a person comes only for a special purpose, that shall not fix a domicile. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy: for if such a purpose be of a nature that may probably or does actually detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose." The texts of the civil law on the question of domicile have already been cited. Their effect has been well given by *Domat* (*g*): "Le principal domicile de chacun est celui qu'il a dans le lieu où il tient le siège et le centre de ses affaires, où il a ses papiers, qu'il ne quitte que pour quelque cause particulier, d'où, quand il est absent, on dit qu'il est en voyage, où, quand on revient, on dit qu'il est de retour, où il passe les principales fêtes de l'année, où il porte les charges, et où il jouit les privileges de ceux qui en

(*f*) 2 Rob. Adm. Rep. 324.

(*g*) IV. 424.

sont habitans ;” and he adds, “ Il est egal pour ce qui regarde le domicile d’une personne qu’elle reside ou fasse sa demeure dans sa maison propre, ou dans la maison d’une autre tenue a loyer ou a aucun autre titre. Et par cette même raison, que la residence fait le domicile, celui qui a une maison en propre dans un lieu où il ne reside pas, n’y est pas pour cela domicilié.” And the Code Napoleon (*h*) says, “ Le domicile de tout Français, quant a l’exercice de ses droits civils, est au lieu où il a son principal etablissement ;” and that the change of domicile shall be effected by the fact of adopting a real habitation in another place. The “ *Larem ac fortunarum suarum summam*” is in this case to be found only in *London*, which here answers the description given by *Domat* and by the Code Napoleon of that “ real habitation ” which constitutes a domicile. So that, even taking the rule from the other side, that the contract must be governed in its consequences by the law of the place where the spouses intend to reside, as laid down in *Warrender v. Warrender* (*i*), it is clear that *London* was that place, for there is not in the evidence in this case anything to show that at the time of the marriage there was any intention to perform the contract in *Scotland*. The marriage took place in *September* 1801, in an *English* parish church. On the 21st of *October* 1800, Sir *Hugh* had written a letter which showed the possibility of his being prevented from going to *Scotland* in the course of the next year, and on the 16th *December* 1801 was written the next letter which had any reference to that subject, and in that he merely says, “ It is my resolution, please God, to go early next summer into *Scotland*. I wish, if possible, to

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(*h*) Code Civil, ss. 102, 103.

(*i*) *Ante*, Vol. II. p. 488.

on the same subject, dated in January 18
"I am anxious during my visit to *Ross*-
must be very short, to avoid business as
can." No one can say that these letters
intention of possessing a *Scotch* domicile,
by the argument on the other side, is to
retain the domicile of origin. On the other
the letters show an intention to make
"real habitation," the "centre of his affairs"
spot on which he constituted his "*larem
rum suarum summam*." It is a most im-
cumstance that the house in *Gloucester*
taken by Sir *Hugh* on a lease. The law
being right as to the fact of the domicile
decided by the cases of *Strathmore v. Bow*
v. Patrick, and *Rose v. Ross*.

But even supposing the matrimonial domicile
Scotland, that would not, under the facts, re-
render the Appellant legitimate. The law of
this country, and it occurred before marriage,
the law of this country, legitimacy cannot
ferred by a subsequent marriage. The status
child, which it will not be denied depends
the parent, cannot be afterwards changed.
pression that, by the law of *England*, bastar-
dity may be correct or not, but it is pla-

place indelible, the status of the individual is indelible. The authorities of Lords *Eldon*, *Redesdale*, *Lyndhurst*, *Brougham*, and *Wynford*, all go to show that the place of the marriage and the birth determine the status; and they are all founded upon the judgments of Courts or the authorities of the most recognised text writers. If that is so, then the status here has been so determined. If *Merlin* (*k*), as it is supposed, really makes the question depend on the acquisition of the right of citizenship, he is in error; for all the authorities show that domicile, such as is acquired by long residence and having the centre of a man's affairs in a particular spot, and nothing else, can be considered as affecting it. Domicile, again, is not decided, as *Merlin* intimates, by the residence being with or without the *esprit de retour*. It is constituted, as Lord *Stowell* said, by the permanency of the habitation. But domicile does not decide the question of legitimacy, which depends on other circumstances. After reviewing all the authorities, Lord *Brougham*, in *Birtwhistle v. Vardill* (*l*), says, speaking of the question of legitimacy, "the whole inclination of a man's mind must be towards that law which prevails where each man is born and where his parents were married, supposing the countries to be one and the same; and if they differ, I should then say the law of the birth-place must prevail." There can be no authority for giving to a child born out of *Scotland* the benefit, or imposing on it the liabilities, of the *Scotch* law: so that, even admitting, for the sake of argument, that the domicile of the father before marriage, and, since marriage, that of the mother of the Appellant is to be treated as *Scotch*, and the marriage as a *Scotch* mar-

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(*k*) 9 vol. *Questions de Droit*, 174.

(*l*) *Ante*, Vol. II. p. 272.

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riage, still it is confidently submitted that, on every authority, the child, having been born in *England* and born illegitimate, must so remain.

Mr. *Fleming*, on the same side :—The case divides itself into two parts, the first of which is the question of domicile. It is admitted, that if the domicile is not decided to be *Scotch*, the Appellant has no right to the declarator now prayed. The second point relates to the status of the Appellant, and amounts to this, can she, under any circumstances, be considered legitimate? The 1st *Will.* 4, c. 69, gives jurisdiction (*m*) in these matters to the Court of Session, instead of the Court of the Commissary. Unless the latter Court could before that statute have entered on the consideration of this case, the Court of Session cannot now have any authority to do so. The old authorities are therefore applicable here. The law relating to domicile, as stated by the other side, cannot be supported. Intention is not everything; or if intention is to govern, it must do so when ascertained by the acts, and not by the expressions of the party. The chief authorities declaring what is domicile are the Code Napoleon (*n*), *Denisart* (*o*), *Pothier* (*p*), *Story* (*q*); and they are all collected in *Burge* (*r*). *Vattel* (*s*) has defined domicile to be a fixed residence in any place with an intention of always staying there; but *Story* (*t*) truly observes, that “it would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom.” Taking all these authorities

(*m*) S. 33.

(*n*) Cod. Civ. s. 102, 103.

(*o*) Art. Domicile, 513.

(*p*) Introd. Gen. c. 1, s. 9.

(*q*) Conf. of Laws, c. 3.

(*r*) Com. Col. & For. Law, 40.

(*s*) Bk. 1, c. 19, s. 22.

(*t*) Conf. of Laws, c. 3, s. 43.

together, it is impossible to say that the Appellant here can bring herself within their operation. Sir *Hugh Munro* gave the strongest intimation of his intention as to domicile, by taking a lease of the house in *Gloucester-place*. His intention is therefore against the Appellant's title. But the mere fact of a long residence in a particular place, without any expression of intention as to domicile, has been declared by Lord *Eldon* sufficient to induce him to declare that the domicile was in that place. Such were the circumstances as stated by his Lordship; *Tovey v. Lindsay* (u). That doctrine agreed with the opinion of Lord *Stowell*, in the case of the *Harmony* (x). *Boullenois* gave a direct opinion (y) that the status of legitimacy or illegitimacy was one of those states or conditions of people which do not change with the change of domicile: an opinion which is adopted by Mr. *Burge* in his very learned work (z). And Lord Chief Baron *Alexander*, in delivering the opinion of the Judges in *Birtwhistle v. Vardill* (a), says, "The character of legitimacy or illegitimacy attached to the persons of *English* or *American* claimants by their own law, accompanies them everywhere, and would prevent their being received as heirs everywhere within the limits of the Christian world." There can be no partial legitimacy; it must exist everywhere if it exists at all. Now it is impossible to say that the Appellant is legitimate in the Courts in *England*. If so, she cannot, according to these authorities, be legitimate anywhere. Supposing the domicile of the father and mother at the time of the marriage to have been *Scotch*, that

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(u) Dow, 133. (z) Comm. Col. & For. Law,
 (x) 2 Rob. Adm. Rep. 324. 105.
 (y) Tom. 2, tit. 2, c. 1, obs. (a) *Ante*, Vol. II. 581.
 22, p. 10.

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would not affect the question of the legitimacy of the child which had been born in *England* some years before that marriage. It will be said, however, that to this remark the law of *Scotland* furnishes an exception, by conferring legitimacy on the children through a marriage of their parents celebrated at any distance of time after their birth. But that proposition, if so stated, is not correct. The subsequent marriage will only confer legitimacy under peculiar circumstances. The parties must be *Scotch*, the marriage must be *Scotch*, and there must have existed no impediments to the marriage. It is submitted, too, that a subsequent marriage in *Scotland* will not confer legitimacy on a child previously born out of *Scotland*. The doctrine of legitimation by subsequent matrimony has only been the law of *Scotland* during the last two or three centuries; nor has its operation been admitted in any decided cases except where all the parties have been *Scotch*, and the events have taken place in *Scotland*. It is said to have been borrowed from the canon law, but it was at first somewhat doubtfully recognised by the law writers of *Scotland*; they put it forward, but in general terms. Such was the mode in which Lord *Kaines* treated it (*b*). In ancient times it was certainly unknown. It is not mentioned as a law of *Scotland* in the *Regiam Magistatem*; and it has not been introduced by the authority of any statute. It exists alone upon comparatively recent custom. And even in modern times, the best writer on the law of *Scotland* shows that the operation of this peculiar law is not so universal in itself, nor so easily applied, as it is contended to be in this case. *Bell*, in his "Principles of the Law of *Scotland* (*c*)," says, that

(*b*) Bk. 3, s. 8.

(*c*) 3d Edit. p. 444.

where the domicile of the parents at the birth and the marriage is *Scotch*, the child is legitimated, but that it does not become so by the parents going to *Scotland* to marry. This mode of speaking of the parents in the plural number must be taken, in so careful and accurate a writer, as an indication of his opinion that it would not be sufficient if only one of the parents fulfilled these conditions. That would show that the domicile not of one but of both must be *Scotch*. The Appellant here must contend not that she was legitimated by the marriage, but that she was legitimate from the beginning. But such an argument would at once be fatal to her claim; for at the beginning, namely, from the moment of birth, and for some years afterwards, it is clear that, both in fact and in law, by the law of *Scotland* as well as *England*, she was not legitimate; yet to the extent of that argument she must go, in order to bring herself within the *Scotch* law, for such was distinctly stated to be the *Scotch* law in the case of *Birtwhistle v. Vardill* (d): a doctrine most fully borne out by all the principles deducible from preceding cases. From all the authorities it is clear that the status of the person, especially the status of legitimacy, must be judged of by the law of the country where that status originated. The subsequent domicile of the parents cannot affect it. That domicile will not confer on the child the capacity to acquire legitimacy. And when *Boullenois* and *Merlin* are quoted to show that a child, bastard in *England*, may become legitimate in *France*, the expressions of the latter must be attended to, and they clearly prove that in his opinion such a change could only take place after the naturalisation of both parents and

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(d) Per Lord Brougham, ante, Vol. II. p. 588.

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child. That word does not mean, as it has been contended, domicile, it means naturalisation in the ordinary sense of that term; an act of the supreme authority of a country, adopting as native-born citizens persons who had hitherto been foreigners in it. Such an important change may be worked in that country by its supreme authority, but it cannot be the result of the mere act of the parties themselves. In this case all that has been done is the act of the parties, and it has no such force as to change the status which the law of the country where the Appellant was born fixed upon her at the moment of her birth.

Mr. *Pemberton*, in reply:—The domicile of the father is that of both the spouses. The incidents of the marriage are not governed by the place of the marriage nor of the birth, but by the domicile of the spouses. If there is a conflict of law here, as the matter to be affected is *Scotch* estate, the *Scotch* law must govern. The declarator asked is, that the Appellant is, as *persona designata* under an entail, entitled to be declared the heir of Sir *Hugh Munro*, according to the law of *Scotland*: it is therefore solely a question to be decided by that law. Domicile must decide this case. Residence is one of the indications of intention as to domicile, but it is not conclusive. Intention is superior to mere length of residence. Here the intention was clear. Never for one moment did Sir *Hugh Munro* show an intention to abandon his domicile of origin; on the contrary, he always manifested his sense of *Scotland* being his home, though *London* was his temporary residence. While in *London*, he might, in the words of the code, be described as travelling. His fortune, his rank, his habits, all connected him with *Scotland*; and family

differences first, and afterwards the attachment he had formed in this country, only persuaded him to delay a return to his native country: but with his agents there he kept up a continual communication, and his *Scotch* domicile was never lost. His domicile made his marriage a *Scotch* marriage, and conferred on his child all the benefits of such a contract.

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The *Lord Chancellor*:—My Lords, in these cases the first point to be considered is the rule of the law of *Scotland*, as to the effect of a subsequent marriage of a domiciled Scotsman upon the issue of the parties born before the marriage, when the birth of such issue and the ceremony of marriage took place out of *Scotland*. Not that all those circumstances occur in the case of *Lady Dalhousie v. M'Douall*; but as they do in that of *Munro v. Munro*, it will be convenient to consider the whole of the proposition, and then apply the result to the particular circumstances of each case.

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To whatever principle the law of legitimation by subsequent marriage be attributed, there can be no doubt of the generality of the rule where the parents were capable of contracting marriage at the birth or conception of the child. Wherever, therefore, a marriage follows the birth of children procreated of the parties to the marriage, all the requisites concur which are required by the terms in which the rule is laid down, assuming always that the circumstances are such as to bring the case within the operation of the law of *Scotland*; and as the laws of every country generally affect all those who have their domicile in such country, it would appear that, in order to bring any particular case within this rule of the law of *Scotland*, it could only be necessary to show that the domicile of the parties was *Scotch*.

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The consideration is of much importance in a case in which it is said that no precedent can be found in which the particular facts of this case occurred ; because if the case falls within the terms of the general rule, such rule must govern it, unless it can be shown that there is principle or authority for making it an exception to the general rule, and withdrawing it from its operation.

The two circumstances relied upon for that purpose are, first, that the child was born out of *Scotland* ; and secondly, that the marriage took place out of *Scotland*. If it should appear that neither of these circumstances would, by itself, take the case out of the general rule, the union of the two cannot have that effect. It can hardly be contended that the country in which the marriage takes place is material : it has never been considered material by the writers upon civil law, nor so treated in the decisions of the Courts. In *De Conty's* case (*e*), the marriage, although it took place in *England*, conferred legitimacy on a child whose domicile of origin was in *France*. The law of the country where the marriage is celebrated ascertained its validity ; the law of the country of the domicile regulated its civil consequences. But if the place of the marriage be not material, still less can the place of the birth be so considered. The law of *Scotland* assumes that what in that country is considered as equivalent to a marriage, took place before the birth or conception of the child. If that be assumed, how can it be material in what country the child was born ? This assumption is adopted for the purpose of legitimatising the issue : why is it to be abandoned when it is peculiarly ne-

(*e*) Guessiere, tom. 2, b. 7, c. 7.

cessary for that purpose? If a domiciled *Scotchman* be in the habit, for business or pleasure, of passing part of his time beyond the border, and some of his children are born within and some without the limits of *Scotland*, can it be the law that a subsequent marriage should legitimatise some only of his children, and leave the rest illegitimate? It has been assumed in argument, that any of such children, born in a country which allowed legitimation *per subsequens matrimonium* would be legitimate in *Scotland*, but not if born in *England*, or in any other country which did not recognise such legitimation. This argument is founded upon the supposed indelibility of bastardy, and seems to have its origin in the circumstance of some very learned persons having used expressions applicable to *English* law upon a question of purely *Scotch* law. If *English* parents have a child born in another country, could the legitimacy of such child in *England* be affected by any law of such country? The effect of a *Scotch* marriage must be judged of with reference to *Scotch* law, and that law not only does not admit the doctrine of the indelibility of bastardy, but on the contrary holds that no bastardy is indelible, unless the parents were at the time of the birth incapable of marrying. If, therefore, the law of *England* be imported into the consideration, the effect of the *Scotch* marriage is judged of, not by the law of *Scotland* but by the law of *England*.

In this view of the law of *Scotland*, all the learned Judges of the Court of Session, with the single exception of the Lord President, concurred; and he founded his dissent upon the rule of the law of *England* as to the indelibility of bastardy, and upon expressions of *English* lawyers. But he adds, “in the case of *Rose v. Ross*, I stated in my opinion that I would not take

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the law from such an extreme case as that of a woman taken suddenly, and perhaps prematurely, in labour, whilst travelling in *England* with or without her paramour, and brought to bed of a bastard there and then; returning with it on her recovery to *Scotland*. That is an extreme case; and what might be the law as to it, we must endeavour to settle when the case occurs." Beyond all doubt, a child so born would be affected with indelible bastardy in *England*; and if that is to regulate his status in *Scotland*, the peculiar circumstances referred to would not make an exception in his favour.

For these reasons, and upon these authorities, if the question were to be decided upon the general principles of the civil law, or upon the law as established in *Scotland*, there would not, I think, be any difficulty in coming to the conclusion that the child of a *Scotchman*, though born in *England*, would become legitimate for all civil purposes in *Scotland*, by a subsequent marriage of the parents in *England*, if the domicile of the father was, and continued throughout to be *Scotch*. It remains to be inquired whether there are authorities against such a conclusion.

In *Shedden v. Patrick* (*f*) the question did not arise, because the father was there held to be domiciled in *America*. In that case, therefore, there was wanting that only circumstance upon which rests the title of the child to claim the benefit of the laws of *Scotland*.

In *Strathmore v. Bowes* (*g*), if it was not assumed that the domicile of the father was *English*, it certainly does not appear to have been proved to be *Scotch*; Lord *Eldon* saying the domicile was princi-

(*f*) Dict. Decis. "Foreign," App. n. 6, 1 July 1803. (*g*) 4 Wils. & Shaw, App. 89.

pally in *England*; but the decision seems to have turned upon this, that the claim was to a *British* peerage. Whatever expressions may have fallen from Lord *Redesdale*, for none can be quoted as coming from Lord *Eldon*, the decision of that case cannot be quoted as an authority in a case respecting *Scotch* property, in which the domicile of the father was *Scotch*.

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In *Rose v. Ross* (*h*), the domicile of the father was *English*. Lord *Lyndhurst* stated, as the ground of his opinion, that although the marriage was in *Scotland*, it was a marriage of persons having an *English* domicile, and coming into *Scotland* for the purpose of the marriage only. If this case proves anything bearing upon the present, it is that it is not the place of the marriage, but the domicile of the parties married, which regulates the civil consequences of the marriage.

For the same purpose, and for that only, the case of *Warrender v. Warrender* (*i*) has application to the present, because in that case it was assumed, and I think correctly, that for civil purposes in *Scotland*, a marriage in *England* of a domiciled Scotchman was to be considered as a *Scotch* marriage.

These decisions, therefore, do not establish any principle or lay down any rule inconsistent with the proposition that the child of a Scotchman, though born in *England*, becomes legitimate for all civil purposes in *Scotland*, by the subsequent marriage of the parents in *England*, if the domicile of the father was, and continued throughout to be *Scotch*. If this be the rule of law in *Scotland*, it embraces the case of *Munro v. Munro*, and therefore includes that of *Lady*

(*h*) 16 July 1830; 4 Wils. & Shaw, 289. (*i*) *Ante*, Vol. II. p. 488.

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Dalhousie v. M'Douall, and renders it unnecessary to consider some of the minor points discussed; such as whether the mother had or had not lost her *Scotch* domicile, and whether the fact of the conception having been in *Scotland* might not of itself have led to a decision in favour of the legitimacy. In both cases the question of fact remains to be considered, namely, what was the domicile of the father. In both cases the domicile of the father was originally *Scotch*; and the question is whether, in either instance, he had at the time of the marriage lost this domicile of origin.

Questions of domicile are frequently attended with great difficulty; and as the circumstances which give rise to such questions are necessarily very various, it is of the utmost importance not to depart from any principles which have been established relative to such questions, particularly if such principles be adopted, not only by the laws of *England*, but generally by the laws of other countries. It is, I conceive, one of those principles that the domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and acquiring another as his sole domicile. Such, after the fullest consideration of the authorities, was the principle laid down by Lord *Alvanley*, in *Somerville v. Somerville (k)*, and from which I see no reason for dissenting. So firmly indeed did the civil law consider the domicile of origin to adhere, that it holds that if it be actually abandoned, and a domicile acquired, but that again abandoned, and no new one acquired in its place, the domicile of origin revives.

(k) 5 Ves. 787.

To effect this abandonment of the domicile of origin, and substitute another in its place, it required *le concours de la volonté et du fait ; animo et facto*; that is, the choice of a place; actual residence in the place then chosen ; and that it should be the principal and permanent residence ; the spot where he had placed *larem rerumque ac fortunarum suarum summam*; in fact there must be both residence and intention. Residence alone has no effect *per se*, though it may be most important as a ground from which to infer intention. Mr. *Burge*, in his excellent work (*l*), cites many authorities from the civilians to establish this proposition. It is not, he says, by purchasing and occupying a house or furnishing it, or vesting a part of his capital there, nor by residence alone, that domicile is acquired, but it must be residence with the intention that it should be permanent. In allegations depending upon intention, difficulties may arise in coming to a conclusion upon the facts of any particular case, but those difficulties will be much diminished by keeping steadily in view the principle which ought to guide the decision as to the application of the facts.

If, then, it be the rule of law of *Scotland* that the domicile of origin must prevail, unless it be proved that the party has acquired another by residence, coupled with an intention of making that his sole residence and abandoning his domicile of origin,—I cannot think that there will be much difficulty in coming to a satisfactory conclusion upon examining the evidence in these cases with reference to this rule. In the case of *Lady Dalhousie v. M'Douall*, there is really no difficulty at all. There is nothing in that case which can raise a question as to the father

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(*l*) 1 Comm. Col. & For. Laws, 54.

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having abandoned his *Scotch* domicile. In the case of *Munro v. Munro* the difficulty is apparently greater, because there was a residence in *England* of many years; but the only period to be considered is from the father quitting *Scotland* in 1794, to the time of the marriage, 1801. There was a sufficient reason, independently of any intention of changing his domicile, for his leaving *Scotland* in 1794. His family house was not in a fit state for residence, and he had failed in effecting a proposed arrangement with his mother by which he wished to obtain for his own use the house where she lived. There is no ground for supposing that he at that time intended to abandon *Scotland*; the reverse is proved by the first letter he wrote after his arrival in *London* (3d of *September* 1794), in which he gives directions about keeping some land in grass, the only farming he takes pleasure in, and about clothes presses for his dressing-room at *Fowlis*. In *November* 1794 he occupied the office of deputy-lieutenant of *Ross-shire*. In 1795, on the 9th of *February*, he gave directions for the preparations of a will in the *Scotch* form; and in a letter of the 14th of *June*, he states his intention of being in *Ross-shire* at the end of the month, which by subsequent letters it appears was prevented by an attack of illness. He, in a letter of the 1st of *September* 1795, expresses his regret at having been prevented going to *Scotland*; and in a letter of the 14th of *September*, he says he shall be there early next summer; and in a letter of the 18th, he says that he shall, after Whitsuntide next, take the management of his estate into his own hands. Similar expressions occur in many letters of 1795 and 1796. In a letter of the 7th of *October* 1796, he says, "I shall be in *Ross-shire* next year, and should unforeseen

events oblige me to defer my journey," &c.; and in a letter of the 27th of *October*, he directs the payment in kind of hens and eggs to be continued, saying, "when at home I shall have occasion for them." Many letters in 1797 speak of his intended journey to *Scotland*; and in one of the 25th of *November* 1797, he says, "my journey to *Ross-shire*, so long and often retarded by circumstances which I could not foresee, is now, by the advice of my friends here, given up till next summer."

It appears that before this time, that is, in 1794 or 1795, the connexion between the Appellant's father and mother had been formed, and she was born in *September* 1796, which may well account for the continued postponements of his intended journey to *Scotland*; but he does not appear ever to have abandoned the intention; for in a letter of the 28th of *March* 1798, to a person in *Scotland*, he says that he expects very soon to be able to write him the time at which he proposed himself the pleasure of seeing him. In 1799, 1800, and 1801, he gives directions for the fitting up of his family residence in *Scotland*, and for that purpose sends large quantities of furniture from *London*; and in *September* 1801 he marries the Appellant's mother, and by letter of the same year speaks of his intention of coming to *Scotland*. In a letter of the 15th of *April* 1802, he says, "I have resolved to be at *Fowlis* as soon as the house, which is painting and papering, can be inhabited; but as these things do not depend upon my wishes, I cannot fix positively any time. I hope to be in *Edinburgh* in *July* or *August*." He accordingly went to *Scotland* that year with his family, and resided in his family house at *Fowlis*, and there continued till 1808, the Appellant's mother having died

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there in 1803. Lord *Corehouse*, who entered much into this part of the case, in commenting on this correspondence, asked this question: "Do these expressions, when read in connexion with the context, import that he was to return to *Scotland*, with a view to settle permanently there, and to live at the castle of *Fowlis* during the rest of his life? The very reverse is manifest." And then he observes upon expressions used, indicating that the promised visit to *Scotland* would be short. Those observations would be highly important if the question was, whether by his subsequent residence in *Scotland* he had acquired a new domicile there; but they do not appear to me to touch the question whether he had abandoned the domicile of origin in that country, which can only be effected by evidence of an intention to do so, accompanying the act of a residence elsewhere. If he even formed such an intention, to what period is the adoption of that resolution to be referred? in order to be of any effect upon the present question, it would be at some time prior to *September* 1801, the date of the marriage.

That he took a lease of the house in *Gloucester-place*, and formed an establishment there, has been much relied upon, and, in the absence of better evidence of intention as to his future domicile, might be important as affording evidence of such intention, but cannot be of any avail when from the correspondence the best means are afforded of ascertaining what his real intentions were. The having a house and an establishment in *London* is perfectly consistent with a domicile in *Scotland*. This fact existed in *Somerville v. Somerville*, and in *Warrender v. Warrender*. Taking, therefore, the rule of law as to the domicile of origin to be what I have before stated, and applying the

evidence to that rule, I do not find it proved that the Appellant's father acquired a new domicile in *England* with the intention of making that his sole residence, and abandoning his domicile of origin in *Scotland*.

If that be a correct conclusion from the evidence, it follows that the Appellant in *Munro v. Munro*, being the child of a domiciled Scotchman, had, at the moment of her birth, a capacity of being legitimated by the subsequent marriage of her parents for all civil purposes in *Scotland*, and that she accordingly, by the subsequent marriage in 1801, became legitimate, and as such capable of succeeding to the property in question.

The consequences of the opinions I have expressed are these :—I propose to your Lordships to affirm the interlocutor appealed from in *Lady Dalhousie v. M'Douall*, with costs; and to reverse the interlocutor appealed from in *Munro v. Munro*, and to remit the cause back to the Court of Session, with a declaration that the pursuer (the Appellant) is the lawful daughter of Sir *Hugh Munro*.

Lord *Brougham* :—My Lords, I had not the good fortune to be present when this case was argued; and therefore, were it an ordinary case, I should not have expressed any opinion whatever. Nevertheless, from the part I have so frequently taken in cases of this kind, a reference to which has been made in disposing of the present case, both in the Court below and by my noble and learned friend in delivering judgment here, I think it right that I should not suffer the decision of the House to be come to without saying a few words.

There are two questions for the consideration of

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your Lordships, as there were for the consideration of the Court below. The first is, whether, supposing the domicile of the parties at the time of the marriage to have been in *Scotland*, that marriage had the effect of legitimatising issue born in *England* before the marriage; with reference to the question raised before the *Scotch* Court as to the title of the party to be considered an heir of tailzie to a *Scotch* real estate, *quasi* an estate tail, as one of the children of the heir of entail then in possession of that estate. The next question is, whether the domicile was *English* or *Scotch*.

My Lords, on the first of those two questions it is, no doubt, fit to observe that this is at present for the first time undergoing decision. It has frequently been mooted in argument by text writers, in discussions at the bar, and occasionally by learned Judges arguing on the Bench, but up to this time no decision has ever been made either in *Scotland* or here upon the point; namely, whether legitimisation is effected by the subsequent marriage of the parents of a child born out of wedlock, that child being born in a country, and that marriage being celebrated in a country, where no such law holds, but the parties, though being in that country, yet, of course, at the time of the marriage being domiciled in *Scotland*, where the question arises touching the succession to real estate situated in *Scotland*. That question is now about to be decided for the first time one way, having been disposed of in *Scotland* upon the fact only the other way; because, as I shall presently observe, and it is with great satisfaction I state it, the great majority of the learned Judges in the Court below, who dealt with the question of law, came to the same conclusion as that to which I trust your Lordships, on the recommenda-

tion of my noble and learned friend, are now about to come ; but they did not feel themselves called upon to decide the case on that point. It is needless to add that this decision does not run counter to the previous authorities, but, as far as any previous decision approaches the present case, all the weight of authority is in favour of the judgment.

I have now to remind your Lordships of the weight of judicial authority in the Court below upon this question ; in order that it may be by no means supposed that, because your Lordships are reversing this judgment, you are laying down principles of law contrary to the opinion of the learned Judges from whose decision the appeal comes.

The five learned Judges who formed the majority whose decision you are about to reverse, but to reverse on the ground of fact : those five learned Judges, in the first part of their statement, seem rather to save the question. They seem not to dispose of the question, but give afterwards a very plain opinion in the affirmative : I mean the Lord Justice Clerk, and the other four who agreed with him. They state the difficulties which they think exist, in the first place, on the supposition of Sir *Hugh* being a domiciled Scotchman : “ Even upon this supposition, however, we think the pursuer must have had difficulties to encounter which have not yet been resolved by any clear authority in the law of either country. Some of the *dicta* in the ultimate decision of the cases of *Shedden*, of *Strathmore*, and of *Ross*, seem to point to a conclusion against her ; while others of the very highest authority, in the more recent case of Sir *George Warrender*, have rather a contrary bearing. But holding, as we do, that the domicile of the husband was also *English*, we humbly conceive that there is no autho-

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rity on which the claim of the pursuer can be supported." Had it stopped there, I should have said, as I did some time ago, that their Lordships being of opinion that the fact of the *Scotch* domicile was not established, they had no occasion to dispose of the question of law at all, as the question of law did not arise unless the fact of the *Scotch* domicile was proved: but what follows seems clearly to intimate that those learned Judges were of the same opinion upon the point of law with the majority, though they differed from them in point of fact; for they say, "The law, therefore, under which they themselves intended to live as married persons, may very well be allowed to settle the extent of their rights and duties as with each other, but cannot affect the condition of children previously born, which we think must be determined by the law of the country where the parents were domiciled at the birth and the marriage. If the domicile was not the same for both parents at these two periods, we should hold that that of the father at the time of the marriage should give the rule. But as they were the same in this case, the question does not arise:" thus agreeing clearly upon the point of law with the majority of the learned Judges, though they differed in point of fact. They all agreed, with the exception of the learned Lord President. Lord *Corehouse*, who differed upon the question of fact, delivered a very clear judgment upon the point of law; but, with the exception of the learned Lord President, all the Judges of the Court below held that the subsequent marriage of the parents would legitimate the issue before marriage, provided the parties were domiciled at the time of the marriage in a country the law of which recognises legitimation *per subsequens matrimonium*.

My Lords, the learned Lord President has given a

very able, and in my opinion a very striking judgment, particularly striking from that manly straightforwardness which characterises all the judgments of that right honourable and learned Judge. He has applied himself to the question, and has entered into an argument which had a very considerable effect on my mind when I first came to read it; and if I had not looked very carefully into the authorities to which he refers, I should have found great difficulty in differing from his Lordship as to the conclusion at which he arrives; but when I look at those cases which have been shortly referred to by my noble and learned friend, *Shedden v. Patrick*, the *Strathmore* case, and *Rose v. Ross*, I really cannot see how they are to be taken as laying down the rule upon which the Lord President founded his judgment, namely, a status indelible through life being affixed upon the party by the law of the country where that party was born, that character being one of indelible illegitimacy if he was born in *England*, the law of *England* being against legitimation by subsequent marriage. My noble and learned friend, who unfortunately is not now present, who bore a principal part in the last of those cases, *Rose v. Ross* (m), expressly saves the question with respect to the domicile, and says that he gives no opinion upon that part of the case; and the result of what he says plainly is to show that he did not mean to say how it would have been if the domicile had been *Scotch*, the domicile in that case plainly being *English*, and the question therefore no more arose there than it would have arisen here had the fact of a *Scotch* domicile failed the pursuer; but the majority of the learned Judges were agreed in the early part of their judgment that it did not arise at all. I am

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upon the whole of opinion that we must adopt the authority of these cases, or the *dicta* of these cases. It is chiefly perhaps what is said by Lord *Redesdale*, which may not be very accurately reported, which, after all, is only a *dictum*, and not necessary for the decision of the case; it is chiefly on one or two *dicta*, or supposed *dicta*, of that noble and most learned Judge, to whose *dicta* the greatest respect is due, and not certainly upon anything decided, that the Lord President founds his arguments.

My Lords, with respect to the case of *Warrender v. Warrender*, undoubtedly as far as that case goes it is in favour of the legitimacy here, because the domicile of the parties there was clearly held to be *Scotch*. An attempt was made to show that Lady *Warrender's* domicile was not *Scotch*, with a view to another branch of the argument, but we all agreed here that her domicile was the domicile of her husband, and that both parties had a *Scotch* domicile; and we held the marriage in terms, and certainly in substance, to be in the nature of a *Scotch* marriage, though locally contracted in *England*. But though the case of *Warrender v. Warrender* might have rested entirely, and in my opinion safely, upon that position, of the parties having a *Scotch* domicile, yet that case, properly speaking, did not depend entirely on the *Scotch* domicile, as regarded the nature of the marriage, whether dissoluble or indissoluble. Upon the *Scotch* domicile, as regarded the jurisdiction of the Court, no doubt it must have rested; in order to give jurisdiction at all there must have been some domicile; but as regarded the domicile at the time of the marriage, that case did not rest entirely, or anything like entirely, on the domicile of the parties being *Scotch*, or on its being, if you will, a *Scotch* marriage; because both

myself and my noble and learned friend who concurred in that decision, were clearly of opinion that, though the parties had been domiciled in *England*, that though it had been precisely *Lolley's* case, namely, an *English* marriage between *English* parties who never before in their lives had crossed the *Tweed*, and though in that case, by the rule in *Lolley's* case, a divorce in *Scotland* of that marriage would have been impotent to dissolve it for all *English* purposes, including the right of the parties after the supposed dissolution to re-marry, as they would still have been guilty of bigamy in *England*, yet, that in *Scotland*, for *Scotch* purposes, the divorce would have been valid to dissolve the *vinculum* of the *English* marriage as far as regarded all *Scotch* rights and all *Scotch* considerations. That was the clear opinion both of Lord *Lyndhurst* and myself; the only difference between our opinions was, that I went a step further, and held that *Lolley's* case was wrongly decided even with respect to *England*; but neither he nor I entertained any doubt that *Lolley's* case did not and would not affect the law of *Scotland*, and that the decision was good under the law of *Scotland*, independently and in spite of the decision in *Lolley's* case, and without at all by possibility breaking in upon *Lolley's* case, any more than *Lolley's* case could break in upon that. And in *Warrender v. Warrender*, although the parties held an *English* domicile, and the lady had never before crossed the *Tweed*, there was a jurisdiction in the *Scotch* Court to deal with the question of marriage, and the decree by that Court would have been valid, notwithstanding the *English* domicile; and if your Lordships will only attend to the manner in which my noble and learned friend dealt with the whole of that question, which he went very elaborately

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through, you will see that there cannot be the least doubt upon what the effect of the decision was.

I have here in passing to make an observation which I am sorry to say is somewhat in the nature of a complaint. Lord *Eldon* used often to complain in like manner. I do not go quite so far as he did when he said that no Court was treated in such a way as this Court, the highest Court of all, was; but he certainly had a good right to complain of the manner in which what passed in this Court was taken not always from the most accurate report of what was said. In the course of this session I have had more than once occasion to observe this, but I have never seen it so strikingly as in the present instance; because here are what are called the speeches of Lord *Lyndhurst* and myself in the *Warrender* case, given and printed in the case before your Lordships, from an extremely inaccurate note. I do not mean that the short-hand writer is not accurate; quite the reverse; but I mean that in his note on the present occasion, as must needs sometimes happen when a person takes a note of a judgment when it is read, and when it is much more rapidly delivered than it is spoken, there are very considerable inaccuracies either in taking the note or in having it transcribed. Those inaccuracies are perfectly evident to any who reads the sentences in which they occur; the words are not sensible in many instances, and in other instances there are wrong dates and wrong statements, statements very much the reverse of what were made, and in one or two instances affecting the substance and the import of the judgment. Now what I complain of is this: not at all that parties are very impatient to get a report of what passes here in their cause; that is very natural, and they may get it where they please, and get it more or

- less accurate : but what I complain of is, that after the lapse of a couple of years they should have printed those short-hand writers' notes in these cases, and that then, after the lapse of a year or two, those short-hand notes should be made the foundation of remarks and of arguments in the Court below, when a perfectly accurate and corrected report, compared with the original, had been printed and published by professional gentlemen in the reports of decisions of this House. One should have thought the natural course was to have taken the decision of the case from Messrs. *Shaw & Dunlop's* report, and not from the note which from some cause contained these inaccuracies : but instead of that, the Court below act upon the note in the printed cases, which is inaccurate ; and then, in your Lordships' House, the note is served up as part of the Appendix, and not the note as taken, which it might have been easily, from the printed reports of the gentlemen who at that time reported the decisions of your Lordships' House. Nevertheless, even here I find that Lord *Lyndhurst* says, " It is a connexion" (marriage) " recognised in all Christian countries, and they say" (the Courts below, the *Scotch* Courts, say), " and I think they say with propriety, We are not prevented from pronouncing sentence of divorce *à vinculo matrimonii* in this country, if the parties are domiciled here, merely because a remedy to the same extent is not given in other countries, particularly where the marriage is celebrated." That is as to the question
- of the dissoluble or the indissoluble nature of the marriage ; and then he goes on to remark upon the whole of the cases in regular succession in the *Scotch* Courts, and to show that the *Scotch* Courts have uniformly until the time of *Lolley's* case (which is a fact) exercised this jurisdiction, and dissolved *English* mar-

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marriages, marriages between *English* parties having no *Scotch* domicile, or pretence of a *Scotch* domicile; and that then a doubt for the first time existing, that doubt influenced the decision in the case of *Edmiston v. Edmiston*; and afterwards the whole fifteen Judges, differing from the Commissary, who had been influenced by the decision in *Lolley's* case, set that matter right by reversing the decision of the Commissary, and held that which has been the law ever since, that, without reference to domicile at all, the *Scotch* Courts have a right to dissolve an *English* marriage between *English* parties then resident in *Scotland*, though the parties had never before any domicile whatever in *Scotland*; and that, in *Scotland*, to all intents and purposes that divorce is good and valid.

My Lords, thus much I thought it right to say in consequence of one or two observations that were made upon the case of *Warrender v. Warrender* in the Court below; not denying that, so far as that case goes, it is a decision at once in favour of the principle upon which the point in the present case turns, though certainly it cannot be said to be a decision, or anything like a decision, upon the point itself.

My Lords, the other question is a question of fact; namely, with respect to the domicile of the parties at the time of the marriage. I have not had the advantage which my noble and learned friend enjoyed of hearing that question argued at the bar. I have nevertheless gone through the whole of this case, which appears to lie in a much less narrow compass as regards facts than might be supposed, in consequence of the introduction of a good deal of matter which does not appear quite relevant, and of a great deal of other discussion that perhaps was not perfectly essential to the case (though very able); but nevertheless there is

abundant evidence to settle this question fully in my humble apprehension, and to settle it against the decision of the Court below.

The whole question appears to me to turn upon what took place between the year 1794 and the year 1801, when the marriage took place. The party, Sir *Hugh Munro*, left *Scotland*, where it is not denied he had resided previous to that time. In the year 1794 he left *Scotland*, in consequence of some difference with his mother, and came to *London*: he there formed a connexion which ended in a marriage in *September* 1801. But previously to that marriage, namely, on the 16th of *May* 1796, the pursuer was born, the child of that connexion. Now up to 1794 it is perfectly clear that the domicile was *Scotch*, and it appears to be agreed on all hands that the rules which Sir *William Grant*, then Master of the Rolls, extracted, as he said, from various decisions, the *Annandale* case, *Bruce v Bruce*, and other cases, to all of which your Lordships have been referred, were correct rules. The third of those rules which he extracted from decisions is very material in the present instance, and seems undeniable as the rule of the *Scotch*, as well as of the *English* Courts; and I apprehend it is the rule universally that, where a domicile has been constituted, the proof of the change of domicile is thrown upon the party who disputes it, and that you must show distinctly that there has been the *animus* as well as the *factum*; that there has been a desire and intention to change the domicile, as well as the fact of leaving that place of residence, in order to alter the former domicile and to acquire a new one. Now, my Lords, looking at the facts here, I do not think that they amount to anything sufficient to support the conclusion of a change of domicile. The mere taking of the lease, as some of the learned

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Judges well observed in the Courts below, is explained, and much that otherwise would not be so well understood is explained by the same circumstance; I mean, by the connexion which the party had formed with the mother of the pursuer. That he had a constant intention of returning is certain; and I do not go merely upon the words he uses in the correspondence, when he talks of returning, because that might only mean going back to the place from which he had come; but it is the whole disposition of his mind; that which appears to me through this correspondence shows that it was the fixed intention of Sir *Hugh Munro* to consider *Scotland* still as the place of his residence, and that his being in *London* or any part of *England* was occasional rather than permanent.

My Lords, for the reason which I have given, namely, that I had not the advantage of being present during the argument, I shall not enter into the consideration of the question of fact further than to say that upon looking at the whole of this case with very great care, under the pressure of that anxiety which one naturally feels not only upon a question of such great importance to the parties, but upon a question where it was likely that the inclination of one's opinion should be against the judgment of the Court below, I certainly have come to the same conclusion with my noble and learned friend. Admitting that there may be some doubt—admitting that there may be some conflict in the circumstantial evidence upon which that case must rest—admitting that there is considerable force in several of the arguments of the learned Lord, Lord *Corehouse*, who agrees with the majority of the Judges as to the law, but differs from my noble and learned friend himself, on the fact of domicile; yet still those objections are, in my opinion, sufficiently

answered, and those doubts sufficiently explained, by the considerations which arise from the rest of the evidence, and from the peculiarity of the circumstances in which these parties were placed ; and I think that upon the whole your Lordships are entitled, or rather are called upon, to consider that at the period of the marriage the *Scotch* domicile had not been changed, and that the parties were domiciled as *Scotch* parties at the time when the contract took place. The consequence of this will be, that if your Lordships adopt the opinion of my noble and learned friend upon the subject, upon those two points you will concur in the question of law with almost the whole of the learned Judges ; that you will upon that question give no decision which in the least breaks in upon any former decision ; on the contrary, you will give a decision which is in concurrence with the principle of the former cases which approach the nearest to the present ; and that you will give a judgment, in my humble apprehension, which is consistent with all the principles of the law governing such matters : and that upon the question of fact alone, you are called upon to differ from the Judges of the Court below, differing also, it may be observed, from a very narrow majority of the Judges ; for whereas six were of opinion that the domicile was *Scotch*, seven only were of opinion it was not. Agreeing, as I have said, with almost the whole of them upon the question of law, and upon the question of fact differing with those Judges in the very narrow majority of one, your Lordships will, I trust, agree with my noble and learned friend in a decision reversing the decision of the Court below. I have already referred to the terms of the decision. I apprehend that the decision to be given upon this case is not a judgment absolutely and generally finding that

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the party is legitimate, but it is a judgment finding according to the conclusions of the libel which proceeds upon the statements of the facts, that she ought to be found and declared as lawful daughter, entitled under the will as next heir of entail. It is rather a finding of her having the right, as heir of entail *quasi* lawful daughter, than in terms or in fact a distinct judgment affirming the legitimacy: it is rather a judgment that she is heir of entail, notwithstanding what happened as to her being born before the marriage, than a distinct judgment that she is legitimate; and it is so, taking into account that, in construing the Scotch law, "legitimate" may mean legitimate *per subsequens matrimonium*.

In the *Countess of Dalhousie v. M'Douall*, the interlocutor was affirmed with costs.

In *Munro v. Munro*, the interlocutor was reversed, and the cause remitted, with the declaration advised by the Lord Chancellor.

JOHN BIRTWHISTLE - - - - *Plaintiff in Error.*

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July 1. 3.

AGNES VARDILL - - - - *Defendant in Error.*

1840:
August 10.

A CHILD born in *Scotland*, of parents domiciled there, who at the time of his birth were not married, but who afterwards intermarried in *Scotland* (there being no lawful impediment to their marriage, either at the time of the birth or afterwards), though legitimate by the law of *Scotland*, cannot take, as heir lands of his father in *England*.



THE facts of this case, the opinions of the Judges as delivered by Lord Chief Baron *Alexander*, and the judicial observations of Lords *Brougham* and *Lyndhurst*, pronounced in the session of 1835, have been already fully reported (a). No judgment was given when those observations were so pronounced; but, on account of the difficulty and novelty of the case, it was ordered to be re-argued in the next session, by one counsel on a side. On the 1st of *July* 1839, the Attorney-general appeared to argue the case on the part of the Plaintiff in Error: Mr. *Dampier* was on the other side.

This second argument took place before Lord Chief Justice *Tindal*, Justices *Vaughan*, *Bosanquet*, *Patteson*, *Williams*, *Coleridge*, *Coltman* and *Maule*, and Barons *Parke* and *Gurney*.

(a) *Ante*, Vol. II. p. 571 *et seq.* At p. 600 of that volume will be found a list of corrigenda in the report of Lord *Brougham*'s observations. The pages containing those observations were printed before his Lordship had an opportunity of seeing them: he afterwards desired the corrigenda in question to be made.

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The *Attorney-general* (Sir *J. Campbell*), for the Plaintiff in Error:—But for the opinion of the Court of King's Bench given in this case, it would be deemed perfectly clear that a party legitimate at the place of his birth, was legitimate all over the world. But it is now said, that though a man may be the eldest legitimate son, he is not the heir to his father with respect to his father's lands situated in *England*. This restriction of an eldest son's right is totally inconsistent with the general principle of law relating to the distribution of property. According to this restriction, as admirably explained and its inconveniences illustrated by Lord *Brougham* in his observations in 1835, which were fully assented to by Lord *Lyndhurst*, a person may be legitimate for all intents and purposes in *Scotland*, but if his parents come to reside in *England*, and are possessed of land here, he cannot succeed to the possession of that land, but will be held illegitimate, and the land will pass into another family. There is great reason to doubt whether there is any such distinction between real and personal property. Now it is admitted that a person recognised as legitimate by the law of *Scotland*, would be the next of kin, and would succeed as such to personal estate here: why, then, cannot he be the heir to the lands of the deceased? *Brodie v. Barry*(*b*) will be relied on by the Defendants in Error. There Sir *W. Grant* held that the law of real property must be taken from the country where the land lies; and he referred to *Balfour v. Scott* (*c*), and *Drummond v. Drummond* (*d*), where a similar rule had been laid down in this House. But those cases do not affect

(*b*) 2 Ves. & B. 127.

(*c*) 6 Brow. Parl. Cas. 550.

(*d*) Brow. Parl. Cas. 601.

the present. As a general proposition, it is admitted that the law of the place where the land lies must govern its descent. But that general proposition is modified by the effect of other propositions equally general, and entitled in the particular case to overrule the former. The most important of these is, that the law of the place of birth must determine the status of the individual, and that the status thus given is recognised by the laws of all other countries. *Conty du Quesnoi's case*.—[Lord *Brougham*: As, in *Ilderton v. Ilderton (e)*, it was held that the right of the widow to dower was to be ascertained by the law of the country where the marriage took place, as it was that law which gave her or not the character of lawful wife.]—Exactly so. Lord *Tenterden* seemed to think that the question depended on the law of domicile; but it is submitted that the law of the place of the nativity is that which must govern the decision of the question. The Judges here seem to have taken alarm, lest, by a contrary decision to that which they have given, they should be making the law of *Scotland* prevail over the law of *England*. There is no reason for such alarm. The doctrine has long prevailed that married or not married must be decided by the law of the place of the contract; *Dalrymple v. Dalrymple (f)*, where it was said by Lord *Stowell*, “But the only principle applicable to such a case by the law of *England* is, that the validity of Miss *Gordon's* marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of *England* withdraws altogether, and leaves the legal question

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(c) 2 Hen. Bl. 145.

(f) 2 Hagg. Cons. Rep. 58.

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to the exclusive judgment of the law of *Scotland*." Now if the *English* law is to withdraw here, as it is submitted ought to be the case, then it is clear that as the special verdict shows the marriage subsequent to the birth to have had the effect of legitimatising in *Scotland* the previously born offspring, the *Scotch* law presuming a prior contract, and the birth of such children to have been *ex justis nuptiis*, the Plaintiff in Error is entitled to succeed to these estates. He is legitimate by the law of the country where he was born, the law of that country is, that "*juris et de jure*" the parties were lawfully married "*ab procreatione*."—[Lord Brougham: What would be the case with adopted children?—That does not touch this case. The Christian religion itself recognises them. In this case the legitimacy of the Plaintiff in Error is not in question; it has been admitted by the Judges, but they have refused to admit the consequence of that legitimacy, which they seem to imagine would affect the principle of the law of *England* proclaimed by the Barons, and which, as they said (g), had "obtained in *England* the approbation of every succeeding age." Their Lordships treated the matter as if inheritancy was to be considered merely as a test of legitimacy, whereas in truth it is but a consequence of legitimacy. The statute of *Merton*, which has been so much relied on in this case, is treated of by Lord Coke (h), and the foundation of the distinction between legitimacy and inheritability is considered. But in entering upon that argument Lord Coke merely considers the question of personal status. The nice distinction is made in this case, that lawful

(g) *Ante*, Vol. II. p. 579.

(h) 1 Co. Lit. 7 b.

heir does not mean heir at law. Such a distinction cannot reasonably be maintained. The statute of *Merton* did not change the tenure of the land, nor give a new character to the succession. It was a mere refusal by the Barons to let in the *Roman* law, in the place of the old common law of *England*. The statute of *Merton* left the question of status untouched. That status depends entirely on the place of the birth of the person. If he is legitimate there, the status he has acquired by birth he carries with him everywhere. The cases of *Shedden v. Patrick* (i),—[Lord *Brougham*: That is not an authority in another case not on all fours with it.]—and *Bowes v. Strathmore* (j), are the converse of the present, and they establish most distinctly the doctrine now contended for; the claimants in them being refused title to estates, and estates and honours, on the ground that by the law of the country where they were born, they were illegitimate. That principle being applied to the present case would settle the question in favour of the Plaintiff in Error, for he is legitimate by the law of the country of his birth. The case of *Munro v. Saunders* or *Ross* (k), is an instance to the same effect. There *Ross* was by birth a Scotchman, and held land in *Scotland*, which he visited occasionally, but he was domiciled in *England*, and cohabited with an Englishwoman, by whom he had a natural son. After the birth of the child he went to *Scotland*, and there, after a residence of 15 days, he married the mother according to the forms of law in *Scotland*, and remained there, visiting his friends and superintending his estates, for about two months, when he returned with his wife

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(i) Dic. Dec. 1 July 1803, (j) 4 Wils. & Sh. app. 89, n. 5.
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and child to *England*, where they remained domiciled till his death. In that case it was held that the child having been born in *England*, was not heir to the reputed father, so as to inherit lands in *Scotland*. That case, like those already cited, shows that the law of personal status is that which is to be chiefly regarded. There the Lord Chancellor said, “Now, referring to the judgments of some of those learned Judges, I should infer that they came to this conclusion upon the grounds which I am about to state, that by the law of the country where the child was born, it was not only illegitimate, as was found, but that by the law of that country the illegitimacy was indelible, and therefore a subsequent marriage could not have the effect of rendering the child legitimate. A distinction might possibly be made between a marriage in *Scotland*, and one in *America*; but I do not enter into that distinction, for this reason, that if a marriage be celebrated according to the law and usage of the country in which it takes place, and is according to that a complete marriage, it is complete everywhere; and therefore I do not see very distinctly why marriage in *Scotland* should have a greater effect than would be attributable to marriage in *America*, with respect to a child who had been previously born. It appears to me therefore unnecessary to go into that point; it is sufficient that the child being born in a country where the illegitimacy is indelible, that fact in any country whatever would have the effect of rendering that child illegitimate. I collect that opinion to have been expressed by some of the learned Judges in *Shedden v. Patrick*. I collect this also from the judgment of Lord *Redesdale* in the case of the *Strathmore Peerage*, where the noble and learned Lord commented on the case of *Shedden v. Patrick*; and I

believe that at the time when *Shedden v. Patrick* was decided in this House, that noble and learned Lord was a member of it. In the *Strathmore* case these are his observations: ‘I do not enter into the question whether, if this marriage had been celebrated in *Scotland*, it might have had the effect of legitimating the child, because I think it unnecessary; but I must say that I cannot conceive how it would have had that effect. I apprehend that this child was born illegitimate according to the law of the country in which he was born, according to the condition of his mother of whom he was born, and according to the state of his father, who was at the time a person unquestionably domiciled in *England*.’ Taking the whole of the judgment of the noble and learned Lord together, I should conclude that he was of opinion that if the child was illegitimate at the time of his birth, and according to the law of the country where he was born, that character was stamped upon him indelibly, and that no subsequent marriage could render him legitimate. But it is not necessary to decide that question here. These parties were domiciled in *England*, the child was born in *England*; it is true that the marriage did not take place in *England*, but the parties went to *Scotland* expressly for the purpose of being married, and having been married, they returned to *England*, the place of their former domicile.”—The present case, if decided on the principles thus laid down by the Lord Chancellor, and adopted by this House, must be decided in favour of the Plaintiff in Error. Assuming that the child must be born *ex justis nuptiis*, the question arises what are *justæ nuptiæ*? and that is a question which in the present case must be decided by the law of *Scotland*. These may in that country be perfectly

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good for all legal purposes, though not celebrated in the face of the church. So far therefore it is clear that a marriage between these parties by mutual consent may be good, though not performed with all the ceremonies incident to a regular marriage solemnised by ecclesiastical authorities : and a child born of such a marriage may be an heir. Then comes the question, who is an heir ? He is a person pointed out by the law as the eldest legitimate son of his father. And it is not true to say that the heir by the law of *Scotland* is so in consequence only of a fiction, and that no such fiction exists in the *English* law. The fiction does exist ; for if a marriage takes place here, and a child is born one hour afterwards, the *English* law treats that child as if begotten in lawful wedlock, and it is held to be legitimate for all purposes whatever. This can only be, as is the case with the *Scotch* law, by permitting the doctrine of relation to set up a prior contract, evidenced by the subsequent marriage.

What will be some of the consequences of holding that *John Birtwhistle*, the Plaintiff in Error, is not legitimate as heir to his father in *England* ? Suppose there had been a mortgage in fee simple to his father, the Judges here say that he, though legitimate, is not heir ; he would not therefore be the real incumbrancer : but he would be entitled, as next of kin, to the benefit of the mortgage. Again, suppose he himself purchased lands in *England*, and died intestate and without lawful issue, those lands would not go to his father but to the Crown. Again, a person legitimate in *Scotland*, like this Plaintiff in Error, might succeed to a *Scotch* peerage, and by virtue of that peerage might come to sit in Parliament and make laws for *England*, but yet would not be entitled to inherit *English* lands. Such injurious and contradic-

tory results cannot be tolerated by any system of law. But, great as are these inconveniences, they are not all that are chargeable on the law, if it is as contended for on the other side. Suppose a person entitled to a barony by tenure to have two sons, both born in *Scotland*, where the father was constantly domiciled, and one born before and the other after the marriage; which would succeed to the barony? Or again: it is admitted that the Plaintiff here is the eldest legitimate son: suppose a will devising land to the eldest legitimate son of this person's father, would the Plaintiff take under that will by purchase or by descent? A great many other cases might be mentioned in which the rule that is to exclude this Plaintiff from inheriting would operate to produce the greatest inconsistency and hardship.

This is clearly a case to which the statute of *Merton* cannot apply. That statute, or rather Parliamentary declaration, made by the Barons of the realm, amounted to nothing but a refusal to introduce the *Roman* law into *England* and to substitute it for the old common law. It did not affect the question of the legitimacy of a person born out of the kingdom; nor, if legitimate where he was born, did it affect his right to inherit freehold land in this country. The right to the inheritance here depends, as it does everywhere else, on the status of the individual, and that status is declared by the country of his birth. The declaration of his status being once made, the *English* law recognises and acts upon it; *Dalrymple v. Dalrymple* (1). It will do so here, and the judgment of the Court below must be set aside.

Mr. *Dampier*, for the Defendant in Error:—The

(1) 2 Hagg. Cons. Rep. 58.

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question now to be argued before your Lordships must of course be confined to the right of the Plaintiff in Error to take the lands in *England* as the heir of the person last seised. There is no necessity for mixing with this question any discussion as to the right to the personalty.

It will of course be admitted that any action to recover land must necessarily be local in its nature. The verdict here finds that children “born in *Scotland* before the marriage are equally legitimate, by the law of *Scotland*, with children born after the marriage, for the purpose of taking land and every other purpose(*m*).” “Legitimate” is the term used in that finding. Now the judgment of this House must proceed on the record as it stands; and the first question therefore will be, whether the Plaintiff in Error can properly be designated as legitimate here. His claim to be so considered depends on his demand that this House should adopt a rule of foreign law. That may be done in certain cases by the tribunals of any country. Is this one of those cases? A foreign law may be adopted by another country: first, if the laws of what I shall call the adopting country are silent on the particular matter to be decided; or, secondly, if the foreign law should not be inconsistent with the law of the adopting country. It is submitted that neither of these conditions can be said to be fulfilled here. Suppose the law of the adopting country not to be silent, then three things are to be considered: first, there may be an inquiry whether there are any provisions of the foreign law on the subject: secondly, what is the law of the forum in relation to an act done abroad, and thus drawn within its jurisdiction, and

(*m*) But see the note, *ante*, Vol. II. p. 572, as to the admitted incorrectness of this general and unrestricted finding.

is the law of the foreign country inconsistent with or opposed to the law of the forum where a decision is to take place on that act and its consequences: and thirdly, what are the acts themselves thus brought within its jurisdiction. If the law of the country where the consequences of an act done in another country are to be considered, is silent as to that particular act, then it must be asked whether the foreign law coincides with the general principles of the law of that country; and if not, then whether there is so little variance between them that, without a violation of the great principles of the law of the latter, the comity which exists between civilised nations will permit the one country to adopt the law of the other with respect to that act. In settling these questions, much regard is to be paid to the thing which is the subject-matter of the intended operation of the law. Thus lands and personalty require to be differently dealt with. Lands are the *corpus regni*, and the same amount of comity cannot be permitted with regard to the laws which govern them, as with regard to the laws which govern personalty and have no necessary connexion with the civil polity of the state. One great settled maxim universally recognised is, that the obligatory force of laws cannot extend beyond the territory of the country which has made them: and this is especially true of laws which regulate the descent of the land of any country. It is clear, therefore, that where any foreign law would interfere to change their application in a particular country, it must come thither recommended by great authority before it can even ask to be allowed in that country to exercise any force whatever, though only as a mere matter of comity. In this case the foreign law which seeks to interfere with our rules of the descent of land,

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is that which declares that a subsequent marriage of the parents shall render legitimate their previously born children. *Pothier's* Treatise on the Contract of Marriage (*n*) gives the history of that law. It is not of very ancient date in *Scotland*, and it is wholly opposed to the law of this country. But when the question is merely as to the personal status of an individual, the tribunals of this country have consented, under certain circumstances, to recognise the status thus conferred; *Countess of Cunha's* case (*o*). And this recognition of the status conferred by marriage, if such marriage is performed according to the law of the foreign country where it took place, is admitted by our law (*p*). But the recognition of the legitimacy acquired by a subsequent marriage has never been made in this country for any purposes whatever. For even in the case of *bastard eigné* and *mulier puisne*, which may be supposed to afford an instance of such a recognition, it is clear that the permission given by the law to the issue of *bastard eigné* to remain in possession after the death of their father, was not in recognition of any right derivable to him from that character, but only for the purpose of quieting disputes. No case can be cited in which the right to inherit *English* lands has been admitted as the consequence of legitimation by subsequent matrimony. As an analogous instance, the case of *Conty* (*q*) has been referred to, where a *Flemish* lady and a native of *France* intermarried in *England* after the birth of a son, and that son was held by the Courts in *France* entitled to succeed as heir to his father.

(*n*) Pt. 5, c. 11.

(*o*) 1 Hagg. Cons. Rep. 237; 2 Id. 70.

(*p*) *Latour v. Teesdale*, 8 Taunt. 830.

(*q*) *Guessiere*, Jour. des Princ. Aud. du Parl. tom. 2, liv. 7, c. 7.

The case is cited to show that such a principle of succession exists. But it shows still more strongly that that principle in *Conty's* case was applied because it was the law of *France*, because the law of *France* holds that its provisions follow the persons of *French* subjects everywhere (*r*); and finally (for that is the principle for which the Defendant in Error will contend), because the descent of real property is strictly regulated by the law of the country where that property is situated. The case of *Conty*, therefore, is decisive in favour of the judgment of the Court below. The same inference may be fairly deduced from all those cases in which, as in *Conty's* case, a marriage celebrated in a foreign country has had effects in the country where the property of the married persons lay, different from those which the law of the country of its celebration would have given it. If, then, the law of the country where the land lies is, as a general rule, to govern the descent of that land, can there be any reason for creating an exception to the rule? Is there not in the law of that country everything to forbid such a course? For all purposes whatever, the law of this country requires that a marriage celebrated here shall be celebrated *in facie ecclesiæ* (*s*); and all the authorities show that in ancient times the clergy were the persons who tried and decided the fact of general legitimacy by marriage.

The rule that *antenati* cannot by the laws of *England* succeed to the inheritance of land here, has long been known and recognised by foreign law writers. *Ducange* states it (*t*) as a well-known law, and quotes

(*r*) Tit. Prel. Art. 3.

(*s*) 7 Glanv. c. 14; Brac. l. 5, c. 19; Brit. 12 edit. p. 417; 1 Reeve, 464; 4 Blac. Comm. 162; 2 Inst. 96.

(*t*) Ducange, voc. Legitimat. — Legitimat. per subsequens matrimonium ab Anglis tamen non admissa, nisi quantum ad gradus

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the *English* authorities for it; and *Staundeford* (*u*) mentions as well known the distinction between the succession to lands in *Normandy* and in *England*. There has been nothing to change the law from what it was in those ancient times. On the contrary, the recent cases have recognised and enforced the ancient law. In *Shedden v. Patrick* (*x*). The law of domicile may govern the personal status of the party, but it cannot govern the rights which in many cases are consequent on that status: another principle of law intervenes. It may be true that this may be productive of inconvenience, but considerations of inconvenience alone will not suffice to set aside positive law. Now is there any such positive law in *England*, or is the *English* law silent on the subject? It is submitted that the law is not silent; on the contrary its provisions and principles are positive, and have long been known and recognised. The rule of excluding *antenati* from the inheritance was a rule of the common law; so that when it was proposed at the Parliament of *Merton*, by all the great clergy present, to allow that “*nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quantum ad successionem hereditariam, quia ecclesia tales habet pro legitimis,*” the Barons with one voice answered, that they would not change the laws, “*quæ hucusque usitatæ sunt et approbatæ.*” In fact, therefore, this was but the legislative declaration of an ancient law. And that law was in constant and well-known operation.

ecclesiasticos: quoad vero successionem in bona paterna, omnino repudiata, statuto præsertim Mertonensi, ann. 1235, c. 9. 20; quod etiam observatum a Bractono, lib. 2, c. 29, s. 4. Fortescuto de Laudibus Legum Angliæ, c. 39; Auctore Fletæ, lib. 1, c. 15, s. 3, and lib. 6, c. 39, s. 34; et Seldeno ad Fletam, c. 9, s. 2.

(*u*) De Prer. Reg. c. 12, p. 39.

(*x*) Dict. Dec. “Foreign,” App. n. 6, 1 July 1803.

When *Edward* 3, being possessed of a large part of *France*, to quiet the doubts of his *English* subjects settled in his *French* dominions, caused laws (*y*) to be enacted in their favour, declaring that their issue born in those dominions should inherit lands in *England*, “comme,” or as well as those born in *England*, he did not confer, nor was it ever thought he conferred on his subjects born abroad privileges distinct from those enjoyed by his *English*-born subjects. The Acts merely meant to give *English* citizenship to those who it was doubted might otherwise become aliens. Another statute passed long afterwards (*z*), but with a similar purpose, enabling natural-born subjects to derive title to land in *England* through alien ancestors, is subject from the first to the same construction. The title could not be derived through an alien in any other way than it could have been derived through a natural-born subject. The statute did not put aliens in a better position than natural-born subjects, but exactly elevated the former to a level with the latter. If, therefore, the alien ancestor had been a bastard, descent could no more be traced through him than through a bastard that was native born. Nor do any of the subsequent statutes, 7 *Anne*, c. 5, 4 *Geo.* 2, c. 21, and 13 *Geo.* 3, c. 21, at all infringe this principle. They only put certain foreign-born persons on the same footing as *English*-born subjects. It is impossible to conceive that the Legislature could have intended to do more. It could not have been intended to give foreign-born subjects privileges relating to land in *England*, which were not conceded to the natives of the country. Directly, therefore, the law of *England* is opposed to the claim of an *ante-*

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(*y*) 25 Ed. 3, c. 2 ; 45 Edw. 3, c. 10. (*z*) 11 & 12 Will. 3, c. 16.

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natus to inherit land here ; and indirectly there is no provision in his favour, but every one provision of the statutes passed to benefit foreign-born persons, being properly construed, must be taken to carry out the provisions of the general law against such exceptional rights. In several parts of the dominions of the Crown of *England*, this law of legitimation by subsequent matrimony exists, yet there is not one instance to be found in the law books of *England* showing that a person so legitimated had been admitted to the inheritance of *English* land. Is not this of itself decisive against the claim ? The cases must have arisen, yet the claim never has been put forward ; the sense of the whole profession must ever have held it unsustainable. This unbroken practice of the law is now confirmed by the deliberate opinion of the Judges of *England*. Is there any reasonable ground for saying that that opinion is not well founded ? it is confidently submitted that there is none.

From what has already been advanced, it is clear that as the law of *Scotland* is now settled, it is on this point directly at variance with the law of *England*; it is at variance with the clearest and best-settled principles of our law. According to the general principle of the independence of each other, enjoyed by the laws of each sovereign state, it is impossible to consent that the laws of *England* should on this vital question give way to the laws of another country. The subject of the independence of the laws of foreign states enjoyed by every sovereign state, which indeed on that account alone is called a sovereign state, is ably treated by Mr. Justice *Story* (a). To his remarks the House may with propriety be referred.

(a) C. 2, s. 32.

Personal status alone cannot decide this case. *Story* (b), quoting *Voet* (c), affirms "that it is certainly the doctrine of the common law that a man may have a capacity to take real estate in one country, when he is totally disabled to take it in another." And *Boulle-nois* (d) states his opinion that in all cases the real laws of each country are to have effect within the territory of that country. Nay, this principle is so plainly admissible, that even in the same country there may be two *fora* for the laws regulating real property. Such is the case in *England* with regard to gavelkind and borough-*English*, and the ordinary mode of holding land. No one would pretend to say, that because a man married and had children within that part of *England* where gavelkind did not prevail, his lands held under that tenure must be disposed of according to the law of the place where he resided, and not where the lands lay. The distinction between real and personal property is of constant occurrence. The same words in a dower will have one effect with respect to freehold, and another with respect to leasehold property; see the cases cited in the argument of *Doe d. Cadogan v. Ewart* (e); and other authorities are to the same effect (f). *Story* (g), on a review of all the authorities, declares, "that the law of the situs shall exclusively govern in regard to all rights, interests and titles in and to immovable property;" and he adds, "Of course it cuts down all attempts to introduce all foreign laws, whether they respect persons or things, or give or withhold the capacity to acquire or to dispose of immovable property." On all

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(b) C. 11, s. 475.

(c) P. Voet, s. 9, c. 1, n. 2, c. 25.
 p. 252.

(d) Vol. 1, p. 154.

(e) 7 Add. & Ell. 655. 666.

(f) Doctor & Stud. Dial. 2

(g) Conf. of Laws, c. 10, s. 463.

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these grounds it is submitted that the law of *England* differs from the law of *Scotland*; and, though recognising the personal status of legitimacy in a *Scotch* person legitimated by a marriage of his parents after his birth, will not allow that status to be followed by all the incidents of ordinary legitimacy: that it requires, for the purpose of inheritance of land, a legitimacy existent at the time of the birth, and is not satisfied with one subsequently created: that this law relating to real property cannot give way to any foreign law, because, by a universal principle of law, the law of the situs of real property is necessarily dominant over every other; and that, as the Plaintiff in Error cannot fulfil the conditions of this law by proving himself within the terms of it to be the "lawful heir," he is not entitled to succeed to *English* estates, and the judgment of this House must be given for the Defendant in Error.

The *Attorney-general*, in reply :—The *English* law does not refuse to admit the status of the Plaintiff in Error. Can it, then, be guilty of the gross inconsistency of admitting for some purposes and refusing it for others? It cannot do so. It cannot inquire how and to what extent a man is legitimate. If it admits him to be legitimate at all, it admits him so altogether. It takes his character from the foreign law; it cannot, it does not, inquire how that character was conferred. Such an inquiry would involve proceedings for which this country possesses no adequate machinery. The law of a foreign country is received here in proof as a matter of fact. Our law does not inquire into its principles; but the case arising where that law is to be applied, the *English* law applies it in the same way that it would apply the stipulations of a private

contract. The only instances in which foreign law is not of force is when it is opposed to the positive institutions of a country. Thus it is not of force for the purposes of legalising polygamy or slavery. In the cases of *Shedden v. Patrick*, and *Strathmore v. Bowes*, and *Rose v. Ross*, the foreign law was allowed to prevail. Here that law declares that the Plaintiff in Error is the legitimate heir of his father, and as such entitled to succeed to his father's estates in *Scotland*, that country being the place of his father's domicile, of his father's marriage, and of the birth of the child. The *English* law can have no more right to say that he is not the lawful son to take by heirship, than it would have to say that a person declared the lawful heir of his father took by purchase and not by heirship. It is not pretended that it could do that. This subject received a complete exposition in the discussion it underwent among the members of this House in 1835 (*h*). The absurd consequences to which the decision of the Court below must lead were then fully exhibited. Those consequences will not be introduced under the sanction of this House.

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The *Lord Chancellor*:—My Lords, your Lordships have had the advantage of having had this case, raising certainly a most important question, argued with the utmost learning and ability, and we have now to consider in what way the question is to be submitted to the learned Judges. The mode in which it was put to the Judges in 1830, seems to me to state the facts very accurately, and I think, therefore, I cannot do better than put it in the following form :—

A. went from *England* to *Scotland*, and resided

(*h*) *Ante*, Vol. II. p. 582 *et seq.*

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and was domiciled there, and so continued for many years till the time of his death. *A.* cohabited with *M.*, an unmarried woman, during the whole period of his residence in *Scotland*, and had by her a son *B.*, who was born in *Scotland*. Several years after the birth of *B.*, who was the only son, *A.* and *M.* were married in *Scotland*, according to the laws of that country. By the laws of *Scotland*, if the marriage of the mother of a child with the father of such child takes place in *Scotland*, such child born in *Scotland* before the marriage is equally legitimate with children born after the marriage, for the purpose of taking land and for every other purpose. *A.* died, seised of real estate in *England*, and intestate: is *B.* entitled to such property as the heir of *A.*? (i).

That, therefore, is the question I propose to your Lordships to submit to the learned Judges upon this occasion.

Lord *Brougham*:—My Lords, I certainly concur with my noble friend that the question of 1830 is much better than any other which can be put. It raises the point upon the facts stated in the special verdict. That verdict unfortunately did not find, particularly, and in every respect, what the law of *Scotland* is upon the subject: consequently the argument of the learned counsel for the appellant *pro tanto* is damnified. It would have been better if it had been put as the learned counsel Mr. *Murray* (now Lord *Murray*) stated it, whose evidence was believed by the Judge and jury; namely, that the marriage is, by the *Scotch* law, supposed to have been antecedent to the birth, by fiction. But the legiti-

(i) See as to the statement of the facts and of the law of *Scotland*, the note, *ante*, Vol. II. p. 572.

macy as contradistinguished from legitimation, is sufficiently put for the purpose of the argument; and, with the assistance of the authorities, it can leave very little doubt what the *Scotch* law is upon the minds of the learned Judges.

My Lords, I am desirous that the attention of the learned Judges should be directed to that which, moved by the anxiety I felt upon the subject, I stated as the opinion I entertained in 1835, and to the argument I then held. I do not know that it throws any great light upon the question, but it states the points, and refers to the authorities as well as to the principles.

My Lords, I entirely agree that this is a question of very great importance, and of very considerable difficulty: I quite agree with the Attorney-general that is of peculiar importance as affecting the law of *Scotland*; the question being, whether the *lex domicilii*, the *lex loci contractus et nativitatis*, or the *lex loci rei sitæ*, should prevail:—from the time of *Huber* downwards, from the time, indeed, when the distinction between real property and personal arose, the law governing the one being generally the *lex loci rei sitæ*; that governing the other being the *lex loci contractus et domicilii*.

I feel great anxiety that this case should be well considered for another reason; I mean, out of regard for the credit of our *English* Courts. I concur very much in the statement of the Attorney-general, that if what has been laid down in this case be law, the bounds of that law are very narrow. If it is law anywhere, it prevails assuredly only as the law within the bounds of *Westminster* Hall. I know, wherever I go in *Europe*, it is boldly denied to be the law. I know the opinion of *Dr. Story* and other *American*

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jurists also is against us ; and I do not think I could easily overstate the degree in which all these jurists dissent from the judgment of the Court below in this case. A considerable argument against it is to be gathered from the total diversity of the grounds upon which the judgment has at different times been maintained. It was first rested on one ground in the Court of Queen's Bench ; then upon another and very different ground at the bar here in 1830 ; again, upon a third ground, that stated by Lord Chief Baron *Alexander*, in giving the opinion of the Judges to this House ; and lastly, upon a different ground from all the three former, by the counsel to-day at your bar ; and if the Judges are to give their opinions now upon some fifth ground, the discrepancy may support the judgment better in their minds than it will support the judgment or give weight to it in the eyes of any other persons ; for assuredly, a decision resting upon so many different grounds, will be likely rather to sink in the estimation of those who come to a calm consideration of its merits. I cannot help feeling the greatest regret that these questions should be raised here so frequently as they have lately been. Dispose of this as you may, we shall have no end to such cases, unless we adopt the only satisfactory mode that can be devised for settling the controversies and doubts, namely, some legislative measure to relieve the law of this country from the opprobrium which rests upon it in the eyes of all mankind. That there should be a set of questions incalculably important, perhaps the most important to the interests and feelings of individuals which can ever arise in Courts of Justice, and that these questions should be left surrounded with doubt, and incapable of decision for want of some statutory enactment regarding the subject-matter, is

truly lamentable, and not a little discreditable to our jurisprudence. Can anything be more discreditable to the law of a civilised country than that it should be extremely difficult to tell whether a man is married or not ; nay, what is worse, whether a woman is married or a concubine ; that it should be still more difficult to tell whether a person, the issue of a questionable marriage, is a bastard or legitimate ; and that, owing to the conflict of laws, or the discrepancy of the law, it should be declared in one part of the country that a man is a bastard, and in another that he is legitimate ; in one part that a divorce has taken place dissolving a prior marriage, and if that person afterwards crosses the *Tweed*, and intermarries with another woman, he is deemed not to be in the honourable state of wedlock, but in a state of felony ; and having committed bigamy, he may be sentenced to transportation to *Botany Bay*, which actually has happened ? and still more, that if the same party had intermarried again in *Scotland*, he would be held to be in the comfortable state of matrimony, and not of felony ; but if he had *English* estates, the question would arise whether, though the children were legitimate in *Scotland* their birth-place, the law of the country where the property is situated would yet pronounce them bastards ; nay, that in one Court of *England* they would be treated as bastards, and in all other Courts acknowledged to be legitimate ? There are peers sitting in this House affected by the question, the issue of noble families, their parents having been married in *Scotland* after previous divorces, they themselves being of the most spotless character, possessing the most ample estates and the highest honours. It is a very dreadful state of things, affecting the feelings and the character, as well as the property of individuals, that there should

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be this uncertain state of the law. It is still worse to think that all the learning and skill in *Westminster* Hall, if you were to consult it, and all the *Scotch* law in the Parliament House of *Edinburgh*, would not make you sure of getting two opinions to agree upon such questions as these. I hope this state of things will at length be put an end to.

I have agreed all along with what has from the first been said as to the conflict between the laws of *England* and *Scotland*. I have always thought the law of *Scotland*, respecting the marriage contract, exceedingly objectionable, compared to ours. If a divorce is allowed there between parties *bonâ fide*, it might be made good universally. If it is done *in fraudem legis Anglicanæ*, whereby it is also in fraud of the rights of others, you might enact that it should be void universally, and then a man would know whether he was married or not, and a woman whether she was a concubine or a matron, and the child whether he was a bastard or legitimate. If your Lordships, with the aid of the Judges, decide the present question, or any of these questions of status, it does not follow that the general question will be settled. The difficulty just now suggested will arise, and you will have another series of doubts and difficulties, which will not now be removed, because they cannot be anticipated. I would remind your Lordships more particularly of one: we all say that marriage depends upon the *lex loci contractus*; that is to say, a marriage good by the law of the country where celebrated, is also good all the world over. A divorce takes place:—we do not go so far as to say (though, generally speaking, the rule of law is *unumquodque dissolvitur eodem modo quo colligatur*), yet we do not go so far as to say that an *English* marriage may be validly dissolved by a *Scotch* divorce, though *English*

parties may contract a *Scotch* marriage in *Scotland*, which shall be good all the world over. We do not say that the same law which is applicable to the constitution of the contract, applies also to its dissolution. But there is on this point a conflict, and a real conflict, of laws: the *Scotch* lawyers say that the *Scotch* divorce is good to dissolve an *English* marriage, and that a man so divorced may intermarry again. But this divorce, by our *English* decisions, is null if he comes to *England*. The *Scotch* Courts maintain the efficacy of the divorce, and consequently the validity of the second marriage; and they will maintain this to the end of time. All the *Scotch* lawyers and Judges, without any exception, say that the second marriage is good in *Scotland*. I do say that this conflict of law seems to make an absurdity, which no judicial decision can reconcile to itself. It is self-repugnant; and nothing but an Act of the Legislature can reconcile it upon sound principles. A man comes here with a *Scotch* wife, and with issue born in *Scotland*—that *Scotch* wife is held to be a concubine, for aught I know, in *England*. The decisions go, at all events, to this extent, that the *English* law does not acknowledge the validity of the *Scotch* divorce. He may come here, then, and after the *Scotch* divorce he may intermarry in *England*, and then there are two wives, each claiming this husband. This is the conclusion either way. It is the conclusion from adopting the well-established and well-known principles of allowing the *lex loci contractus*—the law of the country where the marriage was contracted—to prevail universally; and yet not allowing the law of the country where the divorce is had, to regulate the dissolution of the contract. But if the second marriage was good in *Scotland*, and,

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because good there, good in *England* also, then is the man a husband, and prevented marrying a second wife in *England*. If, on the other hand, the *Scotch* marriage is good here, and the divorce bad, he has two wives here, both acknowledged by law.

Now, what is the real origin of all this embarrassment?—A great deal arises from a country possessing one system of law, being connected with a country possessing a different system, like *England* and *Scotland*, and these countries being contiguous. But much the greater part of the inconvenience has arisen from another source, and it shows the danger of departing from sound, solid, and uniform principles. If you had held, originally, that a marriage celebrated in *Scotland*, not *bonâ fide*, by parties really resident there, but by parties who could not be duly married here, and who went to *Scotland in fraudem legis Anglicanæ*, to escape the provisions of the *English* Marriage Act, was a bad marriage in *England*; if, as you ought to have done, you had held by that opinion generally, and declared that it was a bad marriage, and that you would not allow persons who could afford to go to *Scotland*, for the purpose of evading the Marriage Act (and who were really the only people contemplated by that Act), to escape its provisions by this *Scotch* journey; if, instead of holding that to be a good proceeding, and giving it effect, you had said, as you have done in most other cases, “this is done *in fraudem legis*, and shall not prevail,”—then nine parts in ten of the difficulties we now labour under would not have arisen. Lord *Mansfield* always spoke of these marriages as void in *England*: instead of following his opinion, when *Crompton v. Bearcroft* (*k*) came into the Consistorial

(*k*) Bull, N. P. 113.

Courts, it was decided, or is supposed to have been decided, in favour of the *Scotch* marriage. I have often lamented that we have no account of that important case, except in a passage of Mr. Justice *Buller's* Nisi Prius. In the Court of Delegates, a judgment was pronounced in favour of the marriage; but on what argument, or by what Judges, I know not. I only know that there have been doubts expressed concerning the decision.

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Then came *Ilderton v. Ilderton*, which first brought the question before a Court of Common Law. If you look, my Lords, into that case as reported in 2d *H. Blackstone*, you will find the case of *Crompton v. Bearcroft* cited. It was a writ of dower, to which *ne unques accouple* was pleaded; and there was a replication by the demandant of a marriage in *Scotland*, to which the tenant demurred. This demurrer was upon two grounds: the first denied the validity of a *Scotch* marriage in an *English* suit; and this ground was given up as an untenable point. The party never dreamed of arguing it, but confined the argument to another point, whether there ought not to have been a place for the *venue*, and whether the replication ought not to have concluded to the Bishop's certificate, instead of concluding to the country. The question upon the marriage was then abandoned, and the judgment makes no mention of it. Ever since that case, the point has been held to be clear that a *Scotch* marriage, however plainly and grossly *in fraudem legis Anglicanæ*, was a valid marriage. You went wrong in deciding that, as many of us think; but having once gone wrong, when other kindred questions arose, as upon the validity of *Scotch* divorces, you ought either to have retraced your steps, so as to get right again, or you should have continued acting

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upon the same principles. There was no middle course: either come back from your error in *Ilderton v. Ilderton*, and *Crompton v. Bearcroft*, or go upon the same principle: either hold that the going to *Scotland* in fraud of the *English* law does not avail in any way, or hold that the *Scotch* proceeding, however fraudulent, does avail; and if it makes the contract valid, that it also validates the dissolution of the contract. Instead, however, of following up your error, you choose to hold the marriage good, but the dissolution of the marriage bad. See what interminable confusion you have thus got into. Now, in *Lolley's* case, the Judges had an opportunity of retracting *Ilderton v. Ilderton*, and *Crompton v. Bearcroft*; or they might have said, "the cases have ruled that the marriage is good: then so must the divorce be." But, instead of this, they maintained the validity of a *Scotch* marriage, though in fraud of the *English* law, and yet they held that a *Scotch* divorce in the same circumstances is utterly invalid; and hence arise all the difficulties and disagreements by which we are now surrounded. I am sure this is a good reason why Judges, in deciding important questions, should adopt the course, when they have gone wrong, of at once, in an open and manly way, retracing their steps, rather than persist in their error; but, if they do persist in their error, they ought to do it out and out, though to the inconvenience of parties, and not, by way of saving their own consistency, inflict on the people what is proverbially the most miserable of all thraldoms—that of a vague and uncertain jurisprudence. Instead of leaving it uncertain, and subjecting the people to this annoyance, it may be made at least intelligible, by being made consistent; and though the principle was originally wrong, it may

be made to tally with itself. At present it is inconsistent with itself. The principles are in one direction upon one ground, and in another direction upon another.

I do hope that the result of this inquiry will be the settlement of the law, and I cannot speak too highly of the ability with which the argument has been conducted. The question is now ripe for decision. I hope that, when it is considered, we shall have the assistances of the learned Judges in giving our opinions. We shall give our opinions with all due deference to their authority, and all the disposition possible to avail ourselves of their useful aid, but without losing the regard we conscientiously owe to our own opinions; not forgetting, certainly, the impression which may be made upon us by the opinions of the learned Judges, but coming to a deliberate and an unfettered consideration of a question of such paramount importance. When the law, as it now stands, has been thus settled, then those ulterior steps may be taken, which, I apprehend, can alone be satisfactory to the people of both countries: I mean, the final settlement of the law by an Act of Parliament, declaratory in some respects, and enacting in other respects; thus laying down what principles of law shall be fitting to be established for the two countries.

Lord *Wynford*:—My Lords, since I have been at the bar, now nearly fifty years, I have never heard a case argued with more ability than this case has been argued to-day.

My Lords, the question which was put to the learned Judges upon the former occasion, was drawn up by Lord *Lyndhurst*; and I do not think it can be now submitted in a better form. I wish my noble

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and learned friend to accomplish his object of reconciling the law of *Scotland* and *England* in cases similar to this, but I fear there will be great difficulties in his way. I cannot help thinking that it would be better settled by different decisions, as the questions arose, than by an Act of Parliament. We shall, however, have an opportunity of considering the question when the Judges have delivered their mature opinions on the case that is now under our consideration.

The question, in the form proposed by the Lord Chancellor, was agreed to, and put to the Judges, who required time to answer it. On *Monday* the 20th of *July*, their unanimous opinion was delivered in the following terms by

Lord Chief Justice *Tindal* :—My Lords, the facts of the case upon which your Lordships propose a question to Her Majesty's Judges are these :—" *A.* went from *England* to *Scotland*, and resided and was domiciled there, and so continued for many years, till the time of his death. *A.* cohabited with *M.*, an unmarried woman, during the whole period of his residence in *Scotland*, and had by her a son *B.*, who was born in *Scotland*. Several years after the birth of *B.*, who was the only son, *A.* and *M.* were married in *Scotland*, according to the laws of that country. By the laws of *Scotland*, if the marriage of the mother of a child with the father of such child take place in *Scotland*, such child born in *Scotland* before the marriage is equally legitimate with children born after the marriage, for the purpose of taking land, and for every other purpose. *A.* died seised of real estate in *England*, and intestate." And your Lordships, upon the foregoing state of facts, found this question, viz. : "Is *B.* entitled to such property as the heir of *A.*?" And

in answer to the question so proposed to us, I have the honour to state to your Lordships, that it is the opinion of all the Judges who heard the argument (*l*) that *B.* is not entitled to such property as the heir of *A.* We have indeed reason to lament that we have been deprived of the assistance of one of our learned brethren who heard the case argued at your Lordships' bar, the late Mr. Justice *Vaughan*; but as he had expressed a concurrent opinion upon the case at a meeting held immediately after the argument, I feel myself justified in adding the authority of his name to that of the other Judges.

My Lords, the grounds and foundation upon which our opinion rests are briefly these: That we hold it to be a rule or maxim of the law of *England*, with respect to the descent of land in *England* from father to son, that the son must be born after actual marriage between his father and mother; that this is a rule *juris positivi*, as are all the laws which regulate succession to real property, this particular rule having been framed for the direct purpose of excluding, in the descent of land in *England*, the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate; and that this rule of descent being a rule of positive law annexed to the land itself, cannot be allowed to be broken in upon or disturbed by the law of the country where the claimant was born, and which may be allowed to govern his personal status as to legitimacy, upon the supposed ground of the comity of nations.

My Lords, to understand the nature and force of this rule of our law, "that the heir must be a person

(*l*) See *ante*, p. 895.

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born in actual matrimony in order to enable him to take land in *England* by descent," and to perceive, at the same time, the positive and inflexible quality of this rule, and how closely it is annexed to the land itself, it will be necessary to consider the earlier authorities in which that rule is laid down and discussed, both before and subsequently to the statute of *Merton*, and more particularly the legal construction and operation of that statute.

If we take the definition of heir which Lord *Coke* adopts from the ancient text writers, and which is borrowed originally from the *Roman* law (*Coke* upon *Littleton*, 7. b.), viz. that he is "ex justis nuptiis procreatus," the very description points at a marriage celebrated according to the rules, requisites, and ritual of the civil or *Roman* law. "Operæ pretium est scire quid sint justæ nuptiæ," says *Huber* (Lib. 23, lib. tit. 2. de Ritû Nuptinum). He adds, "In promptû est Justiniani Responsio sunt ea quæ secundum præcepta legûm contrahuntur."

But to refer to the "Mirror of Justices," perhaps the very earliest of our text books, it is there laid down in page 70 as an admitted principle, "that the common law only taketh him to be a son whom the marriage proveth to be so." *Glanville*, who wrote in the reign of *Henry* the 2d (probably about half a century before the passing of the statute of *Merton*), in book 7, chapter 13, states that "Neither a bastard nor any person not born in lawful wedlock, can be, in the legal sense of the term, an heir; but if any one claims an inheritance in the character of heir, and the other party object to him that he cannot be heir because he was not born in lawful wedlock, then indeed the plea shall cease in the King's Court, and the Archbishop, or Bishop of the place, shall be com-

manded to inquire concerning such marriage, and to make known his decision either to the King or his Justices." He then, in chapter 14, gives the form of the writ, which will be found not unimportant to the present inquiry, namely,—“The King to the Archbishop: Health.—*W.* appearing before me in my Court, has demanded against *R.*, his brother, certain land, and in which the said *R.* has no right, as *W.* says, because he is a bastard born before the marriage of their mother; and since it does not belong to my Court to inquire concerning bastardy, I send these unto you, commanding you that you do, in the Court Christian, that which belongs to you; and when the suit is brought to its proper end before you, inform me by your letter what has been done before you concerning it. Witness,” &c.

Your Lordships will observe the form of this writ; how precisely it puts the objection against the heir's title upon the very rule of the *English* law, “that he was born before the marriage of his mother;” by which it is necessarily implied that the marriage of the parents had subsequently taken place. Now if the question had been put generally on the fact, whether any marriage had taken place, or upon the legality of such marriage as had taken place; to such a question of general bastardy, as it is called, the Bishop would have found no difficulty in answering, for the answer to that question would have been purely and exclusively determinable by the spiritual law. But as the canon law, on the one hand, held that the subsequent marriage of the parents made the *antenatus* legitimate, and as the common law of *England*, on the other hand, held that such *antenatus* was not legitimate for the purpose of inheriting land in *England*, if the question had gone in the general form, the answer of the Bishop would have certified such *ante-*

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natus to have been legitimate. The law, therefore, framed the question in the precise form contained in the writ, namely, a question of special bastardy, proving thereby how closely, and with how much jealousy, the law adhered to the rule of descent before pointed out. Now, the question so framed did obviously place the Bishop in extreme difficulty in making answer thereto; a difficulty which was very much increased by the constitution of Pope *Alexander* 3d, which had been issued very recently before the time when *Glanville* wrote, viz. in the sixth year of King *Henry* 2d; by which constitution (in part set out by Lord *Coke*, 2d Institute, 96) it was ordained "that children born before solemnization of matrimony, where matrimony followed, should be as legitimate to inherit unto their ancestors as those that are born after matrimony;" and it is upon the subject of this constitution that *Glanville* is commenting in his 15th chapter, when he says, "Upon this subject, it hath been made a question whether, if any one was begotten or born before the father married the mother, such son is the lawful heir if the father afterwards married his mother? Although, indeed, the canons and the *Roman* laws consider such son as the lawful heir, yet, according to the law and custom of this realm, he shall in no measure be supported as heir in his claim upon the inheritance, nor can he demand the inheritance by the law of the realm. But yet, if a question should arise whether such son was begotten or born before marriage or after, it should, as we have observed, be discussed before the Ecclesiastical Judge, and of his decision he shall inform the King or his Justices; and thus, according to the judgment of the Court Christian concerning the marriage, namely, whether the demandant was born or begotten before

marriage contracted or after, the King's Court shall supply that which is necessary in adjudging or refusing the inheritance respecting which the dispute is; so that by its decision the demandant shall either obtain such inheritance or lose his claim."

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The Bishops being placed in the difficulty of this *conflictus legum* by reason of the precise form of the King's writ, at length, at the Parliament holden at *Merton*, in the 20th *Henry* 3d, the statute was framed, which will be found to have a strong and direct application to the present question. That statute has not upon the original roll the title prefixed thereto, upon which observations were made at your Lordships' bar, that it showed the intention of the law to have been no more than to declare the personal status of those who are described in such statute. In the edition of the statutes published under the commission from the Crown, there is no other than the general title "*Provisiones de Merton*;" and no more argument can justly be built upon the title prefixed in some editions of the statutes, than upon the marginal notes against its different sections. That statute or provision of *Merton* runs thus, viz.: "To the King's writ of bastardy, whether any one being born before matrimony may inherit in like manner as he that is born after matrimony, all the Bishops answered that they would not nor could not make answer to that writ, because it was directly against the common order of the church, and all the Bishops instanted the Lords that they would consent that all such as were born afore matrimony should be legitimate, as well as they that be born within matrimony, as to the succession to inheritance, forasmuch as the church accepteth such as legitimate. And all the Earls and Barons, with one voice, answered that they would not

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change the laws of the realm which hitherto had been used and approved."

It is manifest from *Bracton*, who lived and wrote in the time of *Henry* 3d, that shortly after the statute of *Merton*, this question of special bastardy ceased to be sent to the Bishop, and became the subject of inquiry and determination in the King's Courts. In book 5th, chapter 19, after stating the circumstances attending the statute of *Merton*, and also a subsequent council holden in the same year before the King, the Archbishop, the Bishops, Earls, and Barons, whose names he gives, it is ordered that the words in which the writ shall go to the Bishop shall be, "Whether such a one was born before espousals or marriage, or after; and that the Ordinary shall write back to our lord the King, in the same words, without any evasion or subtilty." And he then states, it was further ordered at that council, "That for the reasons before given, and of such common consent, it may be in the election of our lord the King whether he will demand that inquisition to be taken before the Ordinary, or in his own Court; because, when the exception is properly taken, the answer ought not to be obscure;" and accordingly, it will be found, by reference to the year books, that from the time of *Edward* the 3d, the distinction became settled that general bastardy shall be tried by the Ordinary, special bastardy shall be tried *per pais*.—(See the various authorities collected in *Viner's Abridgment*, title Trial Bastardy.)

My Lords, the extent of the dominions of the Crown at the time of the passing of the statute of *Merton* demands particular attention. *Normandy, Aquitaine, and Anjou*, were then under the allegiance of the King of *England*, and had been so at least from the commencement of the reign of *Henry* the 1st. Many of

the nobles and other subjects of the King had large possessions both in *England* and in the countries beyond sea. Those born in *Normandy*, *Aquitaine*, or *Anjou* (as also, in subsequent periods of our history, those born in *Guienne*, *Gascony*, *Calais*, or *Tournay*), whilst under the actual dominion of the Crown, were natural-born subjects, and could inherit land in *England*.—(*Calvin's case*, 7th *Coke*, 20, b.) Many of the very persons who attended at the coronation of *Henry* the 3d, the occasion on which the Parliament met at *Merton* and the statute was passed, Bishops and Earls and Barons, are known from history, and would so appear from their very names and titles, to have been of foreign lineage, if not of foreign birth, and were, at all events, well acquainted with the rule of law which was then so strongly contested: yet,—notwithstanding the rule of the civil and canon law prevailed in *Normandy*, *Aquitaine*, and *Anjou*, by which the subsequent marriage makes the *antenatus* legitimate for all purposes and to all intents; and notwithstanding the precise question then under discussion was whether this rule should govern the descent of land locally situate in *England*, or whether the old law and custom of *England* should still continue as to such land, under which the *antenatus* was incapable to take land by descent,—there is not the slightest allusion to any exception in the rule itself as to those born in the foreign dominions of the Crown, but the language of the rule is, in its terms, general and universal as to the succession to land in *England*. The question is, whether, after the declaration made by that statute, one of the King's subjects, born in *Normandy*, or *Aquitaine*, or *Anjou*, under the circumstances supposed by your Lordships, could have inherited land in *England*? It is not so much a parallel case with the

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present; it is the very case itself; and it seems impossible to contend that such would have been held to be the law. In the first place, there is no other form of any writ to the Bishop than the old form given in *Glanville* and *Bracton*, which raises the express point whether the claimant was born or not before espousals and matrimony of his father and mother: and if the question was brought before a jury, as afterwards became the course of proceeding, then there was no other than that precise issue which could be raised upon the record. Further, if the question was sent to the Bishop, it must have been sent to the Bishop of the diocese where the action was brought, that is, where the land was situate, and not to the Bishop of the diocese where the party whose legitimacy is disputed was born (see the book of *Assisa*, 35, pl. 7); which case seems not obscurely to indicate, that if the birth had been in *France*, the trial would be still before the *English* Bishops; for *Skipwith*, a Judge of the Common Pleas, is made to say there, "You may carry your proofs before him in what place you please, in *England*, or from *France*." Again, the contest above adverted to was a contest between the ancient law and custom of *England*, on the one hand, and the canon law on the other, which should prevail as to the hereditary succession to land in *England*: canon and civil law being acknowledged and prevailing in *England* in all other respects, with the single exception of its application to the descent of land; the same canon and civil law prevailing in the foreign dominions of the Crown generally, and without any exception. There seems, therefore, no reasonable or probable ground for the surmise of any intention in the law-makers of that day, that, with the general refusal and repudiation of this rule of the civil and canon law as to the hereditary succession to land in *England*, there should be a tacit

exception in favour of a claimant born beyond the seas. Again, the custom would rather seem to be one which applies to the land itself, and not to the person only of the claimant, according to an observation of *Bracton*, in the place above cited, when, discussing the very point of the exception on the ground of bastardy, he says, "that every kingdom hath its own customs differing from those of others. For there may be one custom in the kingdom of *England*, and another in the kingdom of *France*, as to succession." And it would be singular indeed, if any such exception existed, that neither *Bracton*, who wrote with so much diffuseness on this very question at the time of this notable refusal of Parliament to alter the law, nor the author of *Fleta*, nor any of the other early writers, should have left the slightest vestige of an allusion to such exception in the rule.

On the contrary, the observation of Lord *Coke*, 2d Institute, 98, although not made in any case in a Court of Law, proves, in a manner which leaves no doubt, what would have been the opinion of that great lawyer upon the point now under discussion, if it had arisen in his time: "Some have written," he says, "that *William* the Conqueror, being born out of matrimony, *Robert*, his reputed father, did after marry *Arlot*, his mother, and that thereby he had right by the civil and canon law; but that is *contra legem Angliæ*, as here it appeareth." This is in effect saying, although born in *Normandy*, and legitimated in *Normandy* by the subsequent marriage of his father and mother there, so that he could inherit land in *Normandy*, yet as to land in *England* he could not take it by descent, for the same law would be the law of descent of a kingdom and of land within it. This is the very case now put to the Judges by your Lordships.

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It therefore appears to be the just conclusion from these premises, that the rule of descent to *English* land is, that the heir must be born after actual marriage of his father and mother, in order to enable him to inherit; and that this is a rule of a positive inflexible nature, applying to and inherent in the land itself which is the subject of descent, of the same nature and character as that rule which prohibited the descent of land to any but those who were of the whole blood to the last taker, or like the custom of gavelkind or borough-*English*, which cause the land to descend, in the one case, to all the sons together; in the other, to the younger son alone.

And if such be, as it appears to us to be, the rule of law which governs the descent of land in *England*, without any exception, either express or implied therein, on the score of the place of birth of the claimant, it remains to be considered whether, by any doctrine of international law, or by the comity of nations, that rule is to be let in by which *B.*, being held to be legitimate in his own country for all purposes, must be considered as the heir-at-law in *England*.

The broad proposition contended for on the part of the Plaintiff in Error is, that legitimacy is a personal status to be determined by the law of the country which gives the party birth; and that, when the law of that country has once pronounced him to be legitimate, he is, by the comity of international law, to be considered as legitimate in every other country also, and for every purpose: and it is then contended that, as by the *Scotch* law there is a *presumptio juris et de jure*, that, under the circumstances supposed, the parents of *B.* were actually married to each other before the birth of *B.*, such presumption of the *Scotch* law, by which his legitimacy is effected, must

also be adopted and received to the same extent in the *English* as in the *Scotch* Courts of Justice.

Now, there can be no doubt but that marriage, which is a personal contract, when entered into according to the rites of the country where the parties are domiciled and the marriage celebrated, would be considered and treated as a perfect and complete marriage throughout the whole of Christendom.

But it does not therefore follow, that, with the adoption of the marriage contract, the foreign law adopts also all the conclusions and consequences which hold good in the country where the marriage was celebrated. That the marriage in question was not celebrated in fact until after the birth of *B.* is to be assumed from the form of the question. Indeed, except on that supposition, there would be no question at all. Does it follow, then, that because the *Scotch* hold a marriage celebrated between the parents after the birth of a child to be conclusive proof of an actual marriage before, a foreign country, which adopts the marriage as complete and binding as a contract of marriage, must also adopt this consequence? No authority has been cited from any jurist or writer on the subject of the law of nations to that effect. Nothing beyond the general proposition that a party legitimate in one country, is to be held legitimate all over the world. Indeed, the ground upon which this conclusion of *B.*'s legitimacy is made by the *Scotch* law, is not stated to us, and we have no right to assume any fact not contained in the question which your Lordships have proposed to us. We may however observe that, in the course of the argument at your Lordships' bar, the ground has been variously stated, upon which the laws of different countries have arrived at the same conclusion. It was asserted

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that, by the law of *Scotland*, the subsequent marriage is not to be taken to be the marriage itself, but only evidence, though conclusive in its nature, of the marriage prior to the birth of *B.*; that the canon law rests the legitimacy of the son born before such marriage upon a ground totally different, viz. that having been born illegitimate, he is made legitimate, *legitimus*, by the subsequent marriage, by a positive rule of law, on account of the repentance of his parents: whereas, by the *Scotch* law, a marriage previous to his birth is conclusively presumed, so that he always was legitimate, and his parents had nothing to repent of. *Pothier*, on the other hand (*Contrat de Marr.* part. v. ch. 2, art. 2), when he speaks of the effect of a subsequent marriage, in legitimating children born before it, disclaims the authority of the canon law, nor does he mention any fiction of an antecedent marriage, but rests the effect upon the positive law of the country. He first instances the custom of *Troyes*, “*Les enfans nés hors mariage De Soluto et Solutâ puis que le père et la mère s’épousent l’un l’autre, succèdent et viennent à partage avec les autres enfans si aucuns y’ à ;*” and then adds, “that it is a common right received throughout the whole kingdom.”

Now, it could never be contended by any jurist, that the law of *England* in respect to the succession of land in *England*, would be bound to adopt a positive law of succession like that which holds in *France*, the distinction being so well known between laws that relate to personal status and personal contracts, and those which relate to real and immovable property; for which it is unnecessary to make reference to any other authority than that of *Dr. Story*, in his admirable *Commentaries on the Conflict of Laws*. (See sections 430 and following, where all the autho-

rities are brought together). And if such positive law is not upon any principle to be introduced to control the *English* law of descent, what ground is there for the introduction into the *English* law of descents, not only of the contract of marriage observed in another country, which is admitted to be adopted, but also of a fiction with respect to the time of the marriage? that is, in effect, of a rule of evidence which the foreign country thinks it right to hold.

But admitting, for the sake of argument, and we are not called upon to give our opinion on that point, that *B.*, legitimate in *Scotland*, is to be taken to be legitimate all over the world; the question still recurs, whether, for the purpose of constituting an heir to land in *England*, something more is not necessary to be proved on his part than such legitimacy; and if we are right in the grounds on which we have rested the first point, one other step is necessary, namely, to prove that he was born after an actual marriage between his parents; and if this be so, then, upon the distinction admitted by all the writers on international law, the *lex loci rei sitæ* must prevail, not the law of the place of birth.

My Lords, in the course of the discussion, some stress appears to have been placed on the argument, that if *B.* had died before *A.* the intestate, leaving a child, such child might have inherited to *A.*, tracing through his legitimate parent; and then it was asked if the child might inherit, why might not the parent himself inherit? But the answer to that supposed case appears to be, that if the parent be not capable of inheriting himself, he has no heritable blood which he can transmit to his child; so that the child could not, under the assumed facts, have inherited, and the question therefore becomes, in truth, the same with

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that before us. The case supposed would be governed by the old acknowledged rule of descent: “ Qui doit inheriter al père, doit inheriter al fitz.”

My Lords, the two decided cases that have been relied upon in the course of argument, that of *Shedden v. Patrick*, and that of the *Strathmore Peerage*, do not, upon consideration, create any real difficulty. Those cases decide no more than that no one can inherit without having the personal status of legitimacy ; a point upon which all agree ; but they are of no force to establish the main point in dispute in this case, viz. that such personal status is sufficient of itself to enable the claimant to succeed as heir to land in *England*.

Upon the whole, in reporting to your Lordships as the opinion of the Judges, “ that *B.* is not entitled to the real property as the heir of *A.*,” I am bound at the same time to state, that although they agree in the result, they are not to be considered as responsible for all the grounds and reasons on which I have endeavoured to support and to explain such opinion.

Lord Chancellor :—My Lords, the subject upon which your Lordships have had the opinion of the Judges is of so much importance, and the learning contained in that able opinion is of such a description, as, in my opinion, to require further consideration. I shall therefore propose to your Lordships, that the further consideration of this case be postponed.

Lord Brougham :—My Lords, I perfectly agree in opinion with my noble and learned friend. It is quite impossible to express more strongly than I desire to do, the obligations which I think your Lordships and the law are under to the learned

Judges for the very able, elaborate, and lucid opinion they have given. My Lords, it is perhaps enough to say respecting this opinion of the learned Judges, that in a case which has undergone argument in every form for somewhere about twelve years past (both in the sister kingdom and here), first, in the different Courts of *Westminster* Hall, and, next, at your Lordships' bar; upon which the learned Judges in the Courts below, upon former occasions, in deciding the question submitted to them, and the learned Judges here in assisting your Lordships, have given their opinions and discussed the points—nevertheless, at the eleventh hour, as it were, and at the very end of this long-continued discussion, very great new light, if I may so express it, has been thrown upon the question by the reasonings of the learned Judges, and very important additions have been made by the arguments to-day, to those arguments and to that learning which had been brought to bear upon that question in its former stages, in your Lordships' House, in *Westminster* Hall, and in the Courts of *Scotland*.

Under these circumstances, my Lords, it is not for me to say that the opinion, or rather the leaning of opinion, which, it is well known to your Lordships, I formerly expressed, is not materially affected by the quite new form in which the argument is now placed. I am, however, by no means prepared to state that I shall, on reconsidering the reasons of the learned Judges, now submitted to your Lordships, find a sufficient answer to the difficulties which formerly pressed upon me, which I very fully stated to your Lordships, I think, in the year 1835 (*l*).

Upon these grounds I entirely agree with my noble

(*l*) See *ante*, Vol. II. p. 582.

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and learned friend, in thinking that the further consideration of this case ought to be postponed. I ought to add, that in the whole of the first part of the reasoning of the learned Judges, I was prepared to agree: what I have doubted is the latter part of the reasoning. One thing, my Lords, has struck me; that supposing your Lordships shall ultimately be of opinion that you ought to decide in favour of the Defendant in Error, and to affirm the judgment of the Court below, it will be absolutely necessary that the Legislature should interfere, in order to allay the evils which will arise out of the conflict of laws respecting the personal status in the two parts of the kingdom.

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Lord *Brougham*:—My Lords, this was an ejectment brought to recover possession of lands situated in *Yorkshire*; and a verdict being taken, subject to a special case for the opinion of the Court of King's Bench (from which the record came), with leave for either party to turn it into a special verdict, it came before this House by writ of error, and was twice argued—first, in 1830, when the Judges attended and gave their opinion through the Chief Baron (Sir *William Alexander*), and again in 1839, when your Lordships also had the assistance of the Judges, who have now given their opinion through the Chief Justice of the Common Pleas. The question raised by the special verdict, and argued upon these several occasions, is this, whether a person born in *Scotland*, of parents domiciled there and married there, but intermarrying after his birth, and who, by the law of *Scotland*, is legitimate in consequence of that subsequent marriage, can take real estate in *England* as heir? The Court below held that he could not; and the Judges have all agreed in this opinion.

When, in 1835, I took the liberty of calling the attention of your Lordships to this question, I pointed out what appeared to me to have been material defects in the argument both below and here, on the part of the Defendant in Error; that is, in behalf of the judgment below. The learned and elaborate opinion last given by the Judges, has made very valuable additions to the clear and able, though more succinct statement, given upon the former occasion. It is now for your Lordships finally to dispose of the case; and I deem it my duty to offer a few remarks upon the subject, on account of its great importance, and more especially of the bearing which the principles connected with it, and about to be recognised in your decision, must almost unavoidably have upon other questions.

While I willingly acknowledge the great value of the assistance which we have received from the learned Judges upon this occasion, I feel convinced that there are several matters which still remain to be considered, and some difficulties to be got over, before we can with perfect confidence rely upon the conclusion at which they have arrived. But I shall rest satisfied with referring generally to the scope of the argument which I submitted to your Lordships upon the former occasion (1835); and with observing, that a considerable portion of it is left untouched by the present argument of the learned Judges; and that I, on the other hand, as I stated on hearing their argument, should find it not difficult to reach a conclusion the opposite of theirs, while I yet admitted a very large portion of their positions. In the observations which I am about to offer upon their argument, I purposely abstain from anything more than thus generally referring to its scope, as contrasted with that of the opposite reason-

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ing. What I wish further now to state relates to the detail of their statement, and must be taken as independent of any general answer to it; for which I refer to what I before submitted to your Lordships, as containing that answer by anticipation.

The authorities cited by the learned Judges, especially in the earlier part of their opinion, do not seem conclusive; as, for example, Lord *Coke's* definition of heir, "ex justis nuptiis procreatus," and the text in the *Mirror*, "that the law only taketh him to be a son whom the marriage proveth to be so." These and other authorities only prove the dependence on, and connexion of, legitimacy with marriage, or the inheritable quality with marriage, which in no part of the argument ever could have been denied. The text in *Glanville* seems at first to take the distinction between legitimacy generally or absolutely, and legitimacy by being born in lawful wedlock, as connected with right to inherit; for it says, "neither a bastard nor any person not born in lawful wedlock can be an heir." But, in a subsequent chapter, the writ is given, and that sets forth the denial by the demandant of the tenant's right, "because he is a bastard, born before marriage of the parents;" which seems to indicate that the marriage was required to precede the birth only in order to negative the bastardy: the writ, indeed, adds, that it does not belong to the temporal Court to inquire concerning bastardy, wherefore it is sent to the Court Christian.

It is said that the law frames the writ for the purpose of preventing the Court Christian from answering the question according to the canon or civil law: nevertheless, the Bishops were not compelled, by the exigency of the writ, to confine themselves to the question whether the party was born before or since

marriage, because the bastardy is introduced in terms, as well as the birth and marriage.

A council, however, was held soon after the parliament of *Merton* ; and at that council it was directed that the writ should merely require the Ordinary to examine the date of the birth, and whether before or after marriage ; to prevent, as is said, “ any evasion or subtlety ” on the part of the ecclesiastical authorities.

The argument of the learned Judges upon the statute (of *Merton*) is deserving of great attention ; nor can I at all go along with those who have contended, both in the Court below and here, that it is not a statute, but a refusal to make a statute : such was the contention of the learned Chief Justice (*Tindal*), in the able argument which he delivered when at the bar in the King’s Bench, against the decision (*m*). This statute is only different from other statutes, inasmuch as it is in substance declaratory, and in form somewhat different from that of declaratory Acts in modern times. It is a distinct declaration of what the law had ever been before the statute, and a refusal to alter it. But it is to be observed, that the Bishops, in calling for the alteration, put their demand expressly on the ground that *antenati* are legitimate by the canon law ; and it is in consequence of their legitimacy that the Bishops claim the recognition of their right to inherit. The Barons only affirm that such *antenati* had no right of inheritance by the common law, without saying whether, by the common law, they were legitimate or not ; though assuredly the common law is understood to be declared by the statute against their legitimacy universally and in all respects, as well as with respect to feudal inheritance. But I agree that it somewhat

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(*m*) 5 B. & C. 440.

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aids the view taken by the learned Judges, when we find that special bastardy ceased from the time of the statute to be tried by the Bishop, and has ever since been tried *per pais*.

It may be remarked that the proceeding appears from the Grand Coustumier, to have been a writ of bastardy general, directed to the Ordinary; but the description of bastards there given is worthy of attention: "Sont bastards ceulx qui sont engendres hors mariage;" and then immediately it goes on to say "mais ceulx qui sont engendres devant le mariage si les parens epousent depuis la naissance, ils sont legitimes;" so that, apparently, though born *de facto* out of wedlock, they were in contemplation of law born within wedlock. It may be further observed that *Littleton*, sec. 188, in treating of villenage, gives, as the reason why a bastard is *quasi nullius filius*, that he cannot be heir to any "pur ceo que il ne poit enheriter à nulluy."

The learned Judges object to the observations made at the bar upon the title prefixed to the chapter in question of the statute; namely, that this title showed the enactment only was intended to be a declaration of the personal status. "This title," say the learned Judges, "is not to be found in the original statute:" they refer to the edition published by the Record Commissioners, where "Provisiones de *Merton*" is the only heading of the Act; and they add, "that no more argument can justly be built upon the title prefixed in some editions, than upon the marginal notes against the different sections." If, however, the learned counsel at your Lordships' bar were led into any error in this matter, they had very high example in going astray; no less than that of the Court below, whence this writ of error is brought, and where, when the

cause was first decided, one of the learned Judges (*n*) argued in support of the decision now under revision, on the ground of the heading or title. “We have no occasion,” says Mr. Justice *Bayley*, “in order to answer the question who is *hæres*, to go beyond the statute. The title of it is, ‘He is a bastard who is born before the marriage of his parents;’ not restraining it to those born in *England*.” For myself, I consider the assistance to be equally slender which the one argument and the other derives from this title, even supposing it to have been the one given by the Legislature to the chapter of the Act, which it appears not to have been; which indeed it could not have been, for no titles at all were put on statutes till the 11 *Hen.* 7, as is said by *Treby*, C. J., in *Chance v. Adams* (*o*).

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I am inclined to regard as the most important part of the argument of the learned Judges, their observations on the state of the Crown dominions at the making of the statute. This point had been made in the Court below, but without explanation, and not much dwelt upon. The Lord Chief Justice (*Abbott*) takes it, though only in general terms, yet quite intelligibly (*p*). The learned Judges here have very usefully explained the argument, and illustrated it by important remarks. They have contended that an *antenatus* within the King’s ligeance, but born in *Normandy* (which, by the way, had for above 30 years before the statute ceased to be *English de facto*, though it was not formally ceded till 25 years after), *Aquitaine*, and other provinces where the civil law prevailed, could not have inherited land in *England* under the statute, chiefly because no exception is there made *per expres-*

(*n*) 5 Barn. & Cress. 453.

(*p*) 5 Barn. & Cress. 452.

(*o*) Hard. 325; Amb. 22; 1 Bl. 95.

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sum of such persons, although the connexion of the countries would naturally call the attention of the Legislature to the case, and because no tacit or implied exception can be supposed, in favour of the canon law, for *Norman* subjects of the Crown, when the express words of the Act refuse to adopt the same canon law for *English* subjects of the Crown. The silence of contemporary writers, as *Bracton* and the author of *Fleta*, is very justly referred to in aid of the same conclusion. The other reasoning of the Judges on the passage in *Bracton*, and which, as well as the reference to the customs of gavelkind and borough-*English*, was urged below, seems there to have met with a sufficient answer in the argument at the bar, that those authorities apply to *English* parties, and those customs to the rule of succession none of which matters is disputed; so that the authorities may well stand with the opposite argument. No doubt, if the fact of being born within lawful wedlock be as much a necessary quality to the character of heir by the custom of *England*, as the fact of being youngest son is to being heir by the custom of borough-*English* manors,—if that fact of being born within lawful wedlock can only be judged of according to the *English* law, and admits of as little dispute as the fact of being eldest or youngest child—there is, and there must be, an end of the question. But unless these things are so,—and assuming them to be so is begging the whole question,—the cases put have no useful application to the one in hand.

So of the proposition repeatedly affirmed below, and now largely stated by the learned Judges here, that this law or custom is something inherent in the land—a quality of the land itself, as it were, and not of the claimant. This, of course, would, in one sense,

decide the question; but then it would beg it also: in any other sense it leaves the question untouched; for the dispute will still arise,—what description of person is that to which the descendible quality of the land carries it?

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The argument drawn by the learned Judges from the observation of Lord *Coke*, in the 2d Institute, on the title of *William* the Conqueror, had been used in the Court below (*q*). The passage is not very clear; but where Lord *Coke* says, that some held *William* the Conqueror “to have had right by the civil and canon law” (in consequence of the subsequent marriage of his parents), he is, I presume, supposed to mean right to the Crown of *England*, as nearest maternal relative to *Edward* the Confessor; which he certainly was, being grandson to his maternal uncle, *Richard* of *Normandy*. That this could give him no right to the exclusion of the male branch, represented by *Edgar Atheling*, the Confessor’s great nephew, and who, being grandson of his eldest brother *Edmund Ironsides*, had indeed a title paramount that of the Confessor himself, is quite clear; and although the Conqueror appears to have called himself *Rex Hereditarius* in some charters, historians and antiquaries are agreed that this could only mean heir under the supposed will of the Confessor; for the only dispute as to his title that has ever been raised, is, whether he took by the sword, or as *conquæstor* by purchase (*Spelman’s Glossary, voce Conquæstor*), under the supposed will or gift of the Confessor, about the existence of which much controversy has always been held. As heir,—as one taking by inheritance,—no person has ever asserted his title; and if he took under the Con-

(*q*) 5 Barn. & Cress. 448.

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fessor's gift or will, his legitimacy was really of a little importance as it was to the other and more secure title which he derived from his sword. I indeed Lord *Coke*, or rather those to whom he refers for any reason supposed the male branch to be extinct; then we can understand the passage, always supposing, which is absurd, that a mother's relatives could succeed; and in that case the passage might bear upon the argument; or it may bear upon it if we suppose Lord *Coke* puts the case hypothetically, or refers to some who did consider the male branch settled in *Hungary* to be extinct. Still this seems not very intelligible; for it is believed that *Edward* the Confessor had called them over, as his end approached; that his nephew *Edward* the Outlaw, or Exile, came back and died here; but wherever he died, it is quite certain that he left *Edgar Atheling* his son, who was notoriously in *England* at the Conquest, who was made to join in some proceedings to confirm *William's* title, and was afterwards engaged in an unsuccessful rebellion against him. The passage, therefore, is really not very easily explained; nor is any light thrown on it by the reference to the authorities cited: *William* of *Malmsbury*, b. iii.; *Ingulphus*, lib. vi. cap. 19; and the Grand Coustumier, cap. 27. The first of these, at the place referred to, only says that *William's* father married his mother "aliquando justæ uxoris loco haberet," (*scil.* *Arlottam*); and the second reference (to *Ingulphus*) seems erroneous, for there are no books and chapters in *Ingulphus*, at least in any editions which we now have, or which are known ever to have existed; but all that he says of *William* (who was his patron, and of whom he writes largely, and in praise and defence) is, that the Confessor, aware of *Edgar's* weakness, turned his thoughts towards *William*, taking

into consideration “cognitionem suam;” an expression which he repeats afterwards. The text of the Grand Coustumier (which is the third reference) merely gives the law of bastardy and legitimation generally; nor can I see any reference to *William’s* case in the Commentaries, though I will not undertake to say there may not be some such reference. In the text cited by Lord *Coke* there is certainly none, and in the commentary I can find none. But the difficulties do not end here; because, even if *Edgar* was set aside for imbecility, still the Conqueror was not next heir, for he was only the Confessor’s cousin-german by the mother once removed (*Welsh* nephew, as we say, or nephew *à la mode de Bretagne*, as the *French* have it; and this accounts for some writers calling the Confessor cousin, and some uncle, to the Conqueror): whereas *Edgar’s* sister, afterwards married to *Malcolm* in *Scotland*, was his great-niece by his elder brother. And, moreover, we have now been all along supposing that the connexion of *William* with the Confessor, being through the mother of the latter only, made no difference; whereas, suppose the whole paternal relations had been extinguished, it is difficult to see how, upon any feudal principle, any person could inherit who was not of the blood of the *English* royal family. *William’s* only connexion with *England* was, that his aunt had been married to an *English* king: consequently, it seems quite impossible to understand how he ever could be considered as “having right,” even on the supposition that the lawful course of succession was by nomination and selection from among the whole members of a given royal family. Subject to these observations, we may consider this passage in Lord *Coke* as some kind of indication of his opinion, always supposing the passage to be correct; but there

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can be little doubt that these observations make exceedingly unlikely that Lord *Coke* ever wrote it we now have it. The remark, too, appears in a work which was not published in the author's lifetime. If there were no such uncertainty hanging over the passage, its importance to the argument would be undeniable; it would amount to neither more nor less than Lord *Coke's* opinion upon the case at bar. But it is probable that some such considerations as those to which I have been adverting operated in preventing any attention being paid to this authority in the Court below, where it was cited, but occasioned no observation either at the bar or from the bench. Really there seems no possibility of relying on a dictum which assumes that the legitimacy of a party taking by purchase and not by descent is material to his title and therefore, upon a full consideration of the matter Lord *Coke's* supposed authority, on which so much reliance is placed by the learned Judges, must, without hesitation, be laid out of our view in deciding the present question.

The learned Judges refer to the illustration drawn from a person supposed to claim through the *antenatus* he having predeceased his father; and they hold this to be disposed of by the opinion given on the principal case or question; inasmuch as, if incapable of inheriting himself, he could not transmit heritable blood to his issue; and, generally speaking, no doubt it would be so, although contrary to Lord *Coke's* supposed opinion as to issue of aliens inheriting to each other collaterally. It has been decided that a brother may succeed to a brother, the only connexion of the two being through an alien father, who had no inheritable blood; (*Collingwood v. Pace* (r), where the

(r) 1 Lev. 52.

opinion generally ascribed, and, among others, by *Blackstone*, to Lord *Coke*, is denied by the majority of the Judges to be his, and by none of them affirmed to be so). But a nearer case to the present may be put. Where, by the law of the country, as in *Scotland* and on the Continent, legitimation *per subsequens matrimonium* is admitted, it seems that the authorities have agreed in holding that, if the *antenatus* dies before marriage of his parents, leaving lawful issue, the issue shall take as heir to his grandfather, though he must claim through a person who lived and died illegitimate.

Nor is this case of one who never could himself be heir, transmitting inheritable blood to his issue, confined to those countries and that law of legitimation. We have an example in our own law in the case of bastard *eigné*; and it is worth while to consider how this is treated, though I know not that it materially impeaches the general conclusion to which the argument of the learned Judges leads them, unless by showing how entirely the law proceeds upon the supposition that it is his bastardy, and his bastard only, which excludes the *antenatus* from succession.

Littleton, in sections 399 and 400, says, that the issue of the bastard *eigné*, who, having entered, died seised, shall have the land by reason of the colour which his father had as heir; “for by the law of holy church he is *mulier*, albeit by the law of the land he is bastard.”

Lord *Coke*, in commenting upon the words of *Littleton*, that in such a case the *mulier puisne* is “without remedy,” says, that the descent from the bastard *eigné* not only takes away the entry, like other descents which leave the party to his action, but makes the issue of the bastard become lawful heir:

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adding that, even if the *mulier* be within age, he is barred, because the bastard's issue is become, in judgment of law, lawful heir; "for the law (says he) doth prefer legitimation before the privilege of infancy." Collateral heirs, too, are barred, as well as the *mulier*; and the bastard becoming a monk professed, which is a civil death, has the same effect; his issue succeeds during the natural life of the bastard, and the legitimate heir is barred. In the 2d Institute, Lord *Coke*, as a confirmation of the doctrine, gives the record of a judgment in the 18 *Edward* 1, showing that the *mulier* cannot have an assize of *mort d'ancestor*; and upon the ground that the bastard *eigné* has entered as heir: and the reason assigned by Lord *Coke* is, that "the bastard is accounted of the blood with the *mulier* *puisne*." (2d Institute, 97). But in *Coke Littleton*, 244, b., he puts the case which has been referred to from the law of *Scotland* and the Continent, of the bastard *eigné* dying in his father's lifetime, and leaving issue; this son enters as heir to the grandfather, and dies seised: the *mulier* is barred. "The descent," says Lord *Coke*, "binds him." Now this cannot be from the laches of the *mulier* during the bastard's life; for by the supposition nothing had been done by the bastard to make the *mulier* claim; nor could he claim, for the grandfather was still alive. The laches was in the grandson's life: so that here the reason given for the law fails, viz., that it is unjust to treat a person all his life as legitimate, and bastardise him after his death; for here the *antenatus* never was treated as legitimate at all; he lived and died a bastard; yet his issue claiming through him, who had no inheritable blood, entered as heir to the common ancestor, and by dying seised, barred the lawful issue. Although, however, this consideration

somewhat contradicts the answer given by the learned Judges to the argument at the bar, it yet furnishes another answer to that argument, by showing, that if it proves anything, it proves too much; since in the case of bastard *eigné* there is no question whatever of his right being excluded in the common case (of *English* marriage, birth, and domicile), unless where there has been an entry, and dying seised, without counter claim.

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The short observation made by the learned Judges on the cases of *Shedden v. Patrick*, and the *Strathmore Peerage*, appears hardly to be satisfactory. "These cases," it is said, "only decide that no one can inherit without the personal status of legitimacy; and do not show, what is alone in dispute, that such personal status is sufficient ground for claiming *English* real estate as heir." It appears that these cases establish somewhat more than the first of those positions, and, although they do not decide the second, they appear to give it much countenance. They show that the quality, whatever it is, that must be possessed by a claimant in order that he may take land or honours in *Scotland*, is given to, or withholden from him, according to the law, not of *Scotland*, where the real estate lies, but of the country where his birth and his father's marriage and domicile were. Whether that quality be called legitimacy or anything else is not material; nor is it material whether the quality is required in relation to the property by some positive statutory enactment of the country where it lies, or only by the common law of that country, or by some statute (like that of *Merton*) which declares what the common law always has been. The land in *Scotland* is impressed with a particular quality—that of being descendible to the *antenati*, where the parents have

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intermarried; it is of such a nature as not to descend upon the *mulier puisne*, but upon the bastard *eigné* while in *England* it is of such a nature as to descend to the *mulier*, and not to the bastard. The one quality is as firmly fixed in the soil of *Scotland* as the other is in that of *England*. Then, what have the Courts and what has this House decided in those celebrated cases? That, notwithstanding the inherent descendible quality, and notwithstanding the general rule of the *lex loci rei sitæ*, so much relied on by the learned Judges, both below and here, through their whole argument, the law of the country where the property is must bend to the law of the domicile, marriage, and birth; and, because the latter law excludes *antenatus* from legitimacy, they shall be excluded from the succession to which the former law calls them. The *Scotch* common law says, "Let the land go to the *antenatus*—such is its descendible quality." The *English* common law says, "Let the land not go to the *antenatus*." The question, and the only question, is, have we a right to look beyond the fact, or to ask any but one question, namely, whether a person is *antenatus* or *postnatus*? Whether his parents were married or not at his birth? Are we bound by the simple fact, or may we look to the view taken of it by the law of the foreign country to which the claimant and his parents belonged? The decided cases say, in the instance of *Scotland*, that we may and must look at the foreign law; that the subsequent marriage is immaterial for succession in *Scotland*, if it is immaterial for legitimation in the claimant's country; and the question is, whether, according to the principle of those decisions, it is possible to exclude all reference to the foreign law, where the same kind of question arises as to *English* succession. It is very

possible that the principle of the cases may be inapplicable. This may possibly be proved by argument; but it can hardly be said to have been proved by the only remark made on those cases in the statement of the learned Judges: and this scanty discussion of those cases is the more to be lamented, because, in deciding the present question below, the Court expressly referred to this House as the place where *Shedden v. Patrick*, and the *Strathmore Peerage*, would meet with ample attention as to their bearing upon this argument.

The learned Judges have given no opinion upon the question whether or not a person legitimated by subsequent marriage in a country where that law prevails, is therefore legitimate all the world over: nor, perhaps, was it incumbent on them to argue this for the purpose of answering the question put to them by the House. They contend that the statute, or rather the common law recognised and declared by the statute, requires something beyond mere legitimacy to make an heir to *English* real estate. They agree with the Court below, that legitimacy alone is not sufficient; it must be as was there said (s), legitimacy *sub modo*,—legitimacy and being born in wedlock. Consequently, they appear plainly to admit, that a person may be legitimate for all other purposes, and yet incapable of taking land by descent—that we ought not to say “a man’s eldest lawful son is his heir at law,” but “his eldest lawful son if born in lawful wedlock.”

In another case, *Munro v. Munro*, which has been decided to-day, we held here, as it had been held in the Court below, that a party is entitled to take real

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estate by descent, as legitimate according to the law of the country where it lies, who is bastard by the law established in the country of the birth and marriage. In the Courts which administer that law (the law of *England* in the case put), would the party be considered as bastard or as legitimate, when any right unconnected with real property was claimed? If bastard, then the same person is legitimate in one country and not in another,—bastard where born, and legitimate where the parents are domiciled; though some of the Judges, with whom we agreed in that case, held this to be a solecism in law, considering it clear that the status must be everywhere the same. If legitimate, then it follows that the question of personal status depends on the law of foreign countries, and that this law is imported into *England* as to the consequences of the marriage contract, although the *lex loci contractus* alone regulates the constitution of that contract.

But which way soever we may hold as to these questions, the principles of the two decided cases referred to (*Shedden v. Patrick*, and the *Strathmore Peerage*) are quite consistent with that of the last-mentioned case decided to-day. Those principles are not so easily reconciled to the judgment at present before your Lordships.

Having stated what occurs to me upon the arguments of the learned Judges, again expressing my high sense of the service which they have rendered by the great attention bestowed upon the subject, I rest satisfied with intimating my opinion upon the difficulties which still beset the question, and the anomalies likely to arise from the future application of the principles countenanced in the decision: and though I shall not move your Lordships to give

judgment for the Defendant in Error, if my noble and learned friend should move it, I shall offer no opposition.

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Lord Chancellor :—My Lords, I was not in your Lordships' House when this case was first argued ; but I was present at the argument when the learned Judges were in attendance, and I gave my attention to the opinion expressed by the Lord Chief Justice, and I entirely concur in that opinion. I am extremely satisfied with the ground upon which the Judges put it, because they put the question on a ground which avoids the difficulty that seems to surround the task of interfering with those general principles peculiar to the law of *England*, principles that at first sight seem to be somewhat at variance with the decisions to which the Courts have come. Under these circumstances, as my noble and learned friend does not move the judgment, I move judgment for the Defendant in Error.

Judgment accordingly.

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July 14, 15.

1840 :
August 7.

The CHANCELLOR, RECTOR, DEAN, and
other Members of the Senate of the
UNIVERSITY of GLASGOW, and JOHN
M'MILLAN, Surgeon in *Kirk-street*,
in Calton of *Glasgow*, and WILLIAM
MARSHALL, Surgeon in *Cambuslang*

} *Appellants.*

The PRESIDENT and VISITOR of the FA-
CULTY of PHYSICIANS and SURGEONS
of *Glasgow* - - - - -

} *Respondents.*

Corporation.
Medicine.
University.

THE University of *Glasgow* possessed from an ancient date the power of conferring degrees in arts and sciences, and particularly the degree of doctor or master in all such arts and sciences as should be taught at the University. It had long exercised the power of conferring degrees in medicine. In 1599, King *James 6* granted a charter to "Mr. *Peter Law*, our surgeon, and Mr. *Robert Hamilton*, professors of medicine, and their successors, indwellers in *Glasgow*," by which "they and their successors" were authorised to summon before them, within certain bounds therein mentioned, "all persons professing or using the art of surgery, and to examine them on their literature, knowledge and practice," and to admit them, &c. or to reject them; and in case they should be contumacious, to impose a certain penalty on them. This grant was in terms ratified by a *Scotch* Act of Parliament in 1672. The grantees assumed the name of the Faculty of Physicians and Surgeons of *Glasgow*, and from the date of the grant exercised a supervision over persons practising surgery within the specified bounds. In 1817, the University founded a professorship of surgery, and then, as surgery was one of the arts and sciences taught at the University, conferred degrees in surgery as well as in medicine. The Faculty claimed to exercise its rights over the persons holding these degrees, if practitioners within the bounds. HELD, that the Faculty was a corporation and had a right to this supervision; that the granting by the University of degrees in surgery, to persons who practised within the bounds, would not exempt them from the supervision of the Faculty; and that the power given to the Faculty by the charter to impose a penalty on the contumacious, did not prevent that body from proceeding against them in a Court of Law.

THE Appellants, representing the University of *Glasgow*, had granted to *John M'Millan*, of *Glasgow*

and *William Marshall*, of *Cambuslang* (who also joined in the Appeal), degrees which, by the constitution of the University, were, as it was alleged, sufficient to entitle them to practise as surgeons. The Respondents, claiming to be the President and Visitor of the Faculty of Physicians and Surgeons of *Glasgow*, filed a bill of suspension and interdict against *M'Millan*, *Marshall* and others, to prevent them from continuing to practise as surgeons until they had obtained proper authority to do so from the said Faculty. The Respondents set out, as their title to maintain the bill, the following facts:—King *James 6* issued a letter of gift and commission, under the privy seal of the kingdom of *Scotland*, dated the 29th day of *November 1599*, and which bears as follows:—“*James*, by the grace of God, king of *Scots*, to all provosts, bailies, sheriffs, stewarts or bailies of regalities, and other ministers of justice within the bounds following, and their deputies, and sundry others, our lieges and subjects, whom it effeirs, to whose knowledge these our letters shall come; greeting.—Witt ye us, with advice of our council, understanding the great abuses which has been committed in time bygone, and yet daily continues, by ignorant, unskilled and unlearned persons, who, under colour of chirurgeons, abuses the people to their pleasure, passing away but trial or punishment, and thereby destroys infinite number of our subjects, wherewith no order hath been taken in time bygone, especially within the burgh and barony of *Glasgow*, *Renfrew*, *Dunbritain*, and our sherifffdoms of *Clydsdale*, *Renfrew*, *Lanark*, *Kyle*, *Carrick*, *Air*, and *Cunningham*: for avoiding of such inconveniences, and for order to be taken in time coming, to have made, constituted and ordained, and, by the tenor of these our letters, makes, constitutes and ordains, Mr. *Peter*

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Low our chirurgeon, and chief chirurgeon to our
 dearest son the prince, with the assistance of Mr.
Robert Hamilton, professor of medicine, and the
 successors, indwellers in *Glasgow*, given and granted
 to them, and their successors, full power to call, sum-
 mon and convene before them, within the said burgh
 of *Glasgow*, or in any other of our said burghs or
 publick places of the foresaid bounds, all persons pro-
 fessing or using the said art of chirurgery, and to
 examine them upon their literature, knowledge and
 practice; if they be found worthy to admit, allow and
 approve them, give them testimonials according to
 their art and knowledge, that they shall be found
 worthy to exercise thereafter, receive their oath, autho-
 rise them as accords, and to discharge them to use any
 farther than they have knowledge passing their capa-
 city, lest our subjects be abused; and that every one
 cited, report testimonials of the ministers or elders, or
 magistrates of the parish where they dwell, of their
 life and conversations; and in case they be contu-
 macious to be lawfully cited, every one to be un-
 lawed in the sum of 40*l.*, *toties quoties*, half to the judge
 and the other half to be at the visitor's pleasure. And
 for payment thereof, the said Mr. *Peter* and Mr.
Robert, as visitors, to have our other letters of horn-
 ing on the party or magistrate where the contumacious
 person dwells, charging them to poind, within 24
 hours, under the pain of horning; and the party not
 having gear poindable, the magistrates, under the
 same pain, to incarcerate them while caution respon-
 sible be found, that the contumax person shall com-
 pear, such day and place as the said visitors shall
 appoint, giving trial of their qualification. It shall
 be lawful to the said visitors, with advice of their
 brethren, to make statutes for the common-weal of

our subjects, anent the said arts and using thereof faithfully, and the breachers thereof to be punished and unlawed according to the fault. It shall not be lawful to any manner of person within the said bounds to exercise medicine without the testimonial of a famous university where medicine is taught, or the leave of our or our dearest spouse's chief medicinaries; and in case they failzie, it shall be lawful to the said visitors to challenge, pursue and inhibit them from using and exercising the said arts of medicine under the pain of 40*l.*, to be distributed, the one half to the judge, the other half to the poor, *toties quoties*, if they be found exercising the same, ay and while they bring sufficient testimonials, as said is. That no manner of person sell any drugs in the city of *Glasgow*, except the same be sighted by the said visitors, and by *William Spang*, apothecary, under pain of confiscation of the drugs." And the commission granted "to the said visitors, indwellers in *Glasgow*, professors of the said arts, and their brethren, present and to come, immunity and exemption of all weapons-showing, raids, hosts, bearing of armour, watching, warding, stenting, taxations, passing on assize, inquests in justice-courts, sheriff or burrow courts, in actions criminal or civil, notwithstanding of our acts, laws and constitutions thereof, excepting in giving their counsel, appertaining to the said arts: ordaining all you, the foresaid provost, bailies of burrows, sheriffs, stewarts, bailies of regalities, and other ministers of justice within the said bounds, and your deputies, to assist, fortify and concur, and defend the said visitors, and their posterity, professors of the said arts, and to put the said acts made and to be made into execution, and our letters of our session be granted thereupon, to charge them for that effect,

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within 24 hours next after ye be charged thereto. The letter and commission was presented to the provost and magistrates of *Glasgow*, who judicially ratified and promised to maintain the same, by their act dated 9th *February* 1600. Conformably to the said letter and commission, and powers thereby conferred thereafter the said brethren and their successors, from time to time, made various rules and statutes, anent the said arts, and using thereof. The letter of gift and commission was ratified and approved in Parliament by Act of *Charles* 2, on the 11th of *September* 1672 (a); and the brethren had been, for more than

(a) That Act of Parliament is in the following terms :—" Our Soverane Lord, with advice and consent of his estates of Parliament now presentlie convened be his Majestie's special authoritie, be ratified and approven, and be thir presents ratifies and approves an letter of gift, past under the privy seal, of the date at *Halysrud* House, the penult day of November 1599 years, whereby his Majesty's grandfather of blessed memorie, for avoyding of inconveniencies, and for good order to be tane in tyme comeing, within the burgh and barronie of *Glasgow*, gave and granted full power to the chirurgeans and professors of medicine, within the city of *Glasgow* for the tyme, and their successors, to call and convene before them within the burgh of *Glasgow*, or any other place of the bounds foresaid, contained in the said gift, all persons professing or using the arte of chirurgery, to examine them upon their literature, knowledge and practice; if they be fund wordie, to admit, allow and approve them, give them testimoniell according to their arte and knowledge to exerce thereafter, receive their oaths, and authorize them as accords; and that it shall not be leisum to any maner of persons within the foresaids bounds to exercise medicine without ane testimoniell of ane famous universitie wher medicine is taught, or at leist the persons above mentioned and their successors, under the pains contained in the said gift; and that no maner of persons sell any drogs within the city of *Glasgow*, except they be sighted be the foresaids persons under the paine of confiscation of the drogs; and that no ratton poyson be sold except by the apothecaries, who shall be bund to take caution of the buyers for coast, skaith and damage, as the said letter of gift in the selft at more length proports, in the hail heids, clause articles and circumstances of the samen, and after the forme and tenor thairof, in all points, in so far as the samen gift, and the present ratification thereof, can be extendit, in favours of the present chirurgeans, apothecaries and barbours within the said burgh of *Glasgow*, and their successors allendarlie, and no further; and h

a century past, known and designated as the Faculty of Physicians and Surgeons in *Glasgow*, and have been acknowledged and recognised as such in divers judicial proceedings, as well as acts of adjournal and of Parliament, particularly the acts of adjournal 12th *October* 1709 and 24th *March* 1812, and the statute 55 *Geo.* 3, c. 69, sec. 4 & 5. Ever since the date of the said letter of gift and commission, the complainers and their predecessors have enjoyed and exercised the privileges, rights and powers thereby conferred; and particularly the rights and powers of making statutes anent the said arts, and using thereof, and of convening, examining, admitting, approving, and granting testimonials to such as were qualified, and of discharging and prohibiting such as were contumacious, and did not conform themselves to the said letter and rules made in virtue thereof. The bill then stated various instances in which the complainers (the Respondents), or their predecessors, had enforced the rights conferred on them by the letters patent of *James* 6, and it concluded in the usual manner.

The answer for the defenders (the present Appellants) set forth that the University of *Glasgow* was erected by virtue of a papal bull issued by Pope *Nicholas* 5, in the year 1450. This bull, and all the powers and privileges thereby intended to be conferred upon the University, were ratified both by various royal grants and also by Parliament; and, in particular, by a charter of King *James* 2, in the year 1453, and by

Majestie and estates of Parliament, wills, grants and declares, that this present general ratification shall be als valeid and sufficient to the saids chirurgians, apothecaries and barbours, and their successors allenerlie, as said is, as if the said gift wer word for word heir engrossed, notwithstanding the samen be not so done, wherewith his Majestie and estates of Parliament has dispensed, and be thir presents dispenses for ever."

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another charter of King *James* 3, in the year 1472 but chiefly by what has been called the Foundation Charter or New Erection, granted in the year 1577 by King *James* 6, enlarging and confirming the powers and privileges previously conferred; which charter was afterwards confirmed by the King, and ratified by Parliament in the year 1587.

By these grants this University was empowered to erect professorships, and to grant degrees in all the arts and sciences; and, in particular, to grant the degree of doctor or master in all such arts and sciences as should be taught at the University, to such students and others as, after due examination, should be found worthy of this honour. In some of the grants, the power and privileges conferred upon this University are declared to be the same with those enjoyed by the most ancient and famous universities of *Europe*; and reference is particularly made to the Universities of *Bologna* and *Paris*.

By virtue of these grants, the University of *Glasgow* has been accustomed to confer degrees in all arts and sciences upon those who, after due examination, have been found qualified to teach or practise those arts or sciences.

Since the foundation and endowment of a professorship of surgery in the year 1817, the University of *Glasgow*, following the example of the Universities of *Paris*, *Montpellier*, *Strasburgh*, and other foreign universities, after whose model it was formed, has thought it expedient to grant to proficients in surgery, degrees or diplomas in that department. These degrees are granted after a rigid examination, and only on production of certificates of the attendance of the candidate for two courses at the class of anatomy, two courses of surgery, one of chemistry, one

of the institutions of medicine, one of *materia medica*, and an attendance of 12 months at a regular hospital or infirmary.

The charter granted by King *James 6* to “ Mr. *Peter Law*, the king’s surgeon, and Mr. *Robert Hamilton*, professor of medicine, and their successors,” was made long after the establishment of the University, and therefore could not interfere with its vested rights to confer degrees in all such arts or sciences as should be taught at the University.

In answer, therefore, to the reasons of suspension, the defenders (the Respondents) pleaded—

“ 1. That the suspenders have shown no evidence of being entitled to prosecute as a corporation ; and their title, accordingly, to sue as a body corporate, or to sue in the name of their president and visitor, is denied.

“ 2. That the suspenders are not the successors of *Peter Low* and *Robert Hamilton* mentioned in the original grant.

“ 3. That even if they were, they are not entitled to require that any person who possesses the testimonial of a ‘ famous university where medicine is taught,’ shall submit to any examination of his qualifications before them ; the grant founded on expressly recognising the privileges of the universities, and exempting all those who possess the testimonial of any university where medicine is taught from the examination otherwise required, and authorising such persons to practise medicine without restraint.

“ 4. That the Respondents possess testimonials or diplomas from the University of *Glasgow*, as masters in surgery ; and that these testimonials are granted under the hands of the professor of medicine, and of the other professors.

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“ 5. That, in terms of the grant founded on by the suspenders, no fees or perquisites of any kind are authorised to be levied for the examinations thereby prescribed ; nor is any interdict or other prohibition thereby authorised ; though a certain pecuniary penalty may be levied from those who fail to appear for examination, after being regularly cited. The grant, therefore, does not authorise the claims made by the suspenders.”

The suspenders alleged that until the year 1816 the University had never conferred the degree of *chirurgia magister*, and that it had no authority by so doing to exempt any persons receiving such degree from the jurisdiction of the Faculty of Physicians and Surgeons of *Glasgow*. The persons representing the University, therefore, filed a bill of declarator against the persons representing the Faculty of Physicians and Surgeons, and demanded that their rights should be distinctly declared by the Court of Session. The causes were heard by the Lord Ordinary (*Forbes*, Lord *Medwyn*), and were by him referred to the Judges of the Second Division of the Court of Session, who directed cases to be laid before the Lords of the First Division, and the Lord Ordinary, for their opinions. The majority of the consulted Judges, Lord *Moncrieff* being the only dissentient, gave opinions to this effect : that the Faculty of Physicians and Surgeons was a corporation ; that by virtue of the charter of 1599, ratified in Parliament in 1672, it had power to debar, within the limits mentioned, from the practice of surgery, persons not examined and certificated by that body ; that the degree of doctor of physic from a university where medicine was taught, or a testimonial of skill in surgery, from a university where surgery was taught, would not entitle the person receiving either of them

to practise within the bounds of the Faculty, except by license from the Faculty. The Lords of the Second Division gave judgment for the Faculty in the bill of suspension and interdict, and in the bill of declarator.

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The *Attorney-general* and Sir *W. Follett*, for the Appellants:—The Faculty of Surgeons constituted by the letter of gift 1599 is not a corporation; there are no words in that letter expressly giving it that character, nor anything required to be done by it which renders incorporation absolutely necessary. It is necessary that such an intention to incorporate should be manifested before any incorporation can take place; *The Conservators of the Tone v. Ash* (b). The cases of *The College of Physicians v. Levett* (c), and *The Same v. West* (d), relied on by the other side, are not in point; for both were decided on the particular words of the charter granted to the College, and confirmed by statute, and cannot therefore govern the decision of any other case where the terms of the charter are different. Here the words are nothing like those used in the charter of the *London College*; and though the powers now claimed under them may have been repeatedly exercised, they cannot be supported if they never had a legal origin. Use alone, even constant and daily use, cannot legalise powers which were not lawful in their origin. The powers now claimed by the Appellants were not lawful in their origin: the use of them therefore cannot make them valid. The thing prohibited by the charter is prohibited under a penalty; it is therefore merely a thing which is a

(b) 10 Barn. & Cres. 349.

(d) 10 Mod. 353.

(c) 1 Lord Ray. 472.

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malum prohibitum, and not a thing *malum in se*, and consequently it cannot be made the subject of a penalty and at the same time constitute the foundation of a proceeding like the present. The confirming statute of 1672 must be considered but as a private Act; and *Bankton* (e) says that in such cases private Acts must be treated as nothing but grants from the Crown. Now it is clear that the Crown could not, either by the law of *Scotland* or *England*, for the principle of the law is the same in both countries, grant what is contained in this charter, namely, to make laws anent the said arts, not only in *Glasgow*, or with respect to persons within the body of the corporation, but throughout the realm of *Scotland*. The charter here gives what it is clearly beyond the powers of the Crown to give, and is therefore void. The right of the University to grant degrees in medicine existed long before this body, calling itself the Faculty, was created. It is not disputed that the University may confer the degree of physician without any intervention from the Faculty; it is equally clear that it can confer the degree of surgeon. Both are but degrees in medicine; and the skill of the practitioner being thus secured, the Faculty has no right to interfere with his practice. The object of the charter was not to institute a body to control but to assist the University; and where the University has granted the degree, the practitioner is free from further examination.

The *Lord Advocate* and Dr. *Lushington*, for the Respondents:—This case must be decided entirely by the law of *Scotland*. If so, it is clear that the

(e) *De. 1, tit. 1, c. 10.*

judgment must be affirmed. The University did not till very recently confer degrees in surgery. At the time the charter to the Faculty was granted, the University only conferred degrees in medicine, which do not, and never did, include surgery. The case of a surgeon's fitness was therefore unprovided for when this charter to the Faculty was granted, and the charter was intended to supply the deficiency. There is, therefore, no contest between the prescriptive rights of the University and the Faculty, except so far as the former body has now unwisely raised a contest between them. The *Scotch* and *English* laws, as to corporations, materially differ from each other; and bye-laws, which might be questionable here, would certainly be good in *Scotland*. But even the *English* cases show that where certain powers are vested in *A.*, *B.* and *C.* and their successors, a corporation is created, though no express words of creation are used in the deed, and the ordinary powers of a corporation are inherent in such a body. The case of *The Conservators of the Tone* (*f*), already cited, is a direct authority for that proposition. The two cases already cited (*g*) relating to the *London* College of Surgeons, are also in point. So that, on the *English* cases alone, the judgment of the Court below must be affirmed. But the *Scotch* cases are still stronger for the Respondents; and in the case of *The Faculty v. Steel*, in 1815, the Court of Session decided these very questions, that the Faculty was a corporation, and that it might sue in the Court of Session; and by the *Scotch* law it may do so, though it has at the same time the power to impose a penalty. The *Scotch*

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(*f*) 10 Barn. & Cres. 349.

(*g*) *The College of Physicians v. Levett*, 1 Lord Raym. 672; *Same v. West*, 10 Mod. 353.

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Judges have no doubt that the Faculty is a corporation, and the only difficulty felt by Lord *Moncrieff* was as to a possible conflict of rights between the two bodies; but it has been shown that in reality no such conflict can exist, for the grant to the Faculty was to provide for something which had been left unprovided for by the powers or by the practice of the University.

The *Attorney-general* replied.

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 August 7.

The *Lord Chancellor*:—The question in this case is whether a person who has obtained the degree of doctor in the University of *Glasgow* is entitled to practise within the bounds of the charter of corporation granted to the Faculty of Physicians and Surgeons of that city, without previously undergoing an examination and being licensed by the latter body. It appears that the University of *Glasgow* has but recently granted degrees in surgery, although it had long granted them in physic. The title of the corporation, which claims the right of licensing persons to practice within certain limits, rests on a charter given by *James 6*, and dated on the 29th *November 1599*, and it is in these words:—[His Lordship here read the words of the charter.]—The question between the parties turns on the expressions contained in these letters patent, and on what has taken place since. These letters patent of the Crown give to the grantees and “their successors,” the right of calling before them all persons “professing or using the art of surgery, and to examine them upon their literature, knowledge and practice;” and if they were found worthy, to admit them, and to give them testimonials according to their art and knowledge; and in case of

of these Appellants was founded not on the terms of the grant from the Crown, but on the relative constitution of the rights of the University of *Glasgow* and of this corporation: the University being of a more ancient date, and having the power to grant degrees in medicine, he thought that the grant to the Faculty did not interfere with the privileges of the University. But the University of *Glasgow*, though it granted and has from ancient times granted medical degrees, did not confer any in surgery, and the power to confer them is an exception to its general authority, and is expressly conceded to the Faculty by the terms of the deed of gift.

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Those who practise medicine may take their degrees at this or at some other university; but with respect to surgery, it is the exclusive privilege of the corporation of the Faculty to grant degrees in surgery for persons practising within the bounds of the city of *Glasgow*, and the Faculty has ever since its institution exercised that privilege. If, therefore, there had been any conflict of authority between these two bodies, the length of time during which the one has exercised and the other has abstained from exercising the right of conferring these surgical degrees, would alone be sufficient to enable your Lordships to come to a conclusion on the question. The opinion of the majority, of the great majority, of the Judges was decidedly this way, and, as it seems to me, was perfectly well founded.

When this case was before your Lordships in 1835, it ended in a remit to the Court of Session for the purpose of ascertaining two points, and two only: namely, first, whether this was a legally constituted corporation; and secondly, whether, as it had the power of imposing a penalty on those who contra-

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be found fit or unfit for the profession. I shall not occupy your Lordships' time in detailing the various suits which have since been instituted on this subject, on that order of the Court of Session, but shall merely state the names of the cases, and the year in which they took place; and from them it appears that there has been a repeated exercise of the privilege now claimed, and that in these several suits the right to the exercise of the privilege has been duly acknowledged. The *Calder* case occurred in 1762; the *Dunlop* case in 1791; and the case of *Steele* in 1815, which has been cited as directly in point to this suit. What was the form of the action, and what was the interlocutor pronounced in that case? It was an action by the president and visitor of the Faculty, in their corporate character, against persons practising without a license from the corporation; and the defence set up for the several persons concerned was, first, a denial of the corporate character of the Faculty, and secondly, the fact that the defenders had all obtained the degree of doctor of medicine in a university, and that that included a right to practise surgery. The judgment of the Lord Ordinary, on both points, was in favour of the Faculty, and that judgment was adhered to by the Court of Session. That being the state of the decisions, the present contest has arisen, and the Judges of the Division of the Court of Session before whom the case was brought have consulted the other Judges upon it, and it appears that there were six of the Judges who stated their opinions to be in favour of the rights of the corporation, while another Judge, Lord *Medwyn*, did not wholly concur, and he wrote a separate note of his opinion; and another high authority, Lord *Moncrieff*, did not doubt the title of the corporation, but his opinion in favour

of these Appellants was founded not on the terms of the grant from the Crown, but on the relative constitution of the rights of the University of *Glasgow* and of this corporation: the University being of a more ancient date, and having the power to grant degrees in medicine, he thought that the grant to the Faculty did not interfere with the privileges of the University. But the University of *Glasgow*, though it granted and has from ancient times granted medical degrees, did not confer any in surgery, and the power to confer them is an exception to its general authority, and is expressly conceded to the Faculty by the terms of the deed of gift.

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vened its regulations, that power would supersede the right which the corporation would otherwise have applying to the Court of Session to protect it in the exercise of its authority. This remit produced the learned opinion of the Judges, of which we have not the benefit; they came to the unanimous conclusion that this was a legal corporation according to the law of *Scotland*, and that the power possessed by the corporation of imposing a penalty did not bar its right of appealing to the Court of Session for an interdict under circumstances of this sort. It does not appear to what, if to any extent, the opinion of the House was formed on the other parts of the case. It may be assumed that the declarator was, by the decree of the House, limited to these two points. If it is to be taken as the opinion of the House already expressed that this is a corporation, and that its power of imposing a penalty does not bar its right of applying to the Court, that opinion is one in which I entirely concur.

There cannot be a doubt that if this body is a corporation, the time during which it has claimed to exercise these rights, the frequency of their exercise, and the declarator of the Court of Session in 1688 that it was entitled to exercise them, have sufficiently concluded the question. The right of the corporation has been asserted at different periods, and always with success; so that in my opinion your Lordships can have no difficulty in declaring that the evidence before you is sufficient to establish the rights which the Respondents claim.

There are, however, peculiarities in this corporation which, speaking as an *English* lawyer, I feel might oppose obstacles to my coming to a decision on the case but here we have the clear opinion of the *Scottish*

Judges on the question of *Scotch* law, as applicable to this corporation. There are many instances in which the same objections might be urged against other *Scotch* corporations, but they are not sufficient to invalidate the grant to this corporation. As your Lordships have now the highest possible authority that this case is free from being affected by the objections which have been suggested against it when it was on a previous occasion at your bar, and that the corporation is entitled to all the privilege which it claims, I think your Lordships can have no hesitation in affirming the decree of the Court below.

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Lord *Brougham* :—My Lords, my noble and learned friend has fully stated to you the grounds on which the remit took place in the present case. When it was before the House on the previous occasion, I had certain doubts as to the extent of the powers of these *Scotch* corporations. Those doubts were shared in by my noble and learned friend Lord *Denman*. It is necessary to say this, because by some extraordinary omission the presence of Lord *Denman* is not stated in *Shaw & Maclean's* (i) Report of the former proceedings. My noble and learned friend at that time felt another difficulty, which is now removed by the statement made by the Judges; and that doubt related to the power of the Faculty to make bye-laws. The bye-laws made by this corporation do not answer that description, according to our notions of such things. They are not binding alone on persons *infra* the body of the corporation, but have effect over the whole body of the subjects of the King in *Scotland*; and that was

(i) 2 Shaw & Maclean, 275 *et seq.*

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one of the objections taken to the laws at your Lordships' bar. But it seems, by the law of *Scotland*, these bye-laws are held to be valid, though it would seem to us the reverse of bye-laws. Some of the power as this is enjoyed by other corporations, they are deficient in the means of exercising it. The other doubt we felt was, whether the Crown had power to grant such an exclusive corporation ; but the opinions of the *Scotch* Judges have likewise got rid of this difficulty. On the whole, I am of opinion that we can do nothing but affirm the judgment of the Court below ; and as that Court has not exceeded the power given it in part of the order, I should move that the judgment be affirmed with costs.

Judgment affirmed accordingly.

GEORGE JACKSON - - - - - Appellant.

1840:
June 4.
August 11.

ROBERT JACKSON, ELIAZBETH MAUN-
SELL, and MARIA MAUNSELL - - } Respondents.

A PERSON being by his marriage settlement tenant for life of an estate in *Ireland*, held on lease for lives renewable for ever, with power of appointment to one or more of the children of the marriage,—the estate in default of appointment to go to the first and other sons successively in tail male,—by deed poll, dated the 14th of *January* 1804, appointed to his eldest son an estate in tail male; and by indenture of lease, executed four days after, the father and son, in consideration of 1,600*l.* to be applied in paying debts on the estate, and renewal fines then due, demised part of it for lives. By a deed dated *December* 1807, the son, in consideration of debts paid for him by the father, and in discharge of the trust and confidence reposed in him, conveyed the estate and all his interest therein to the father and hisheirs. The father, by his will made after the death of the eldest son without issue, devised the estate—charged thereby with certain legacies—to the use of his two surviving sons and their respective issue, in equal portions, as tenants in common.—HELD by the Lords (reversing a decree which established the will) that the execution of the lease for 1,600*l.* by the father and son so soon after the deed of appointment, and the circumstances appearing on those deeds and on the deed of reconveyance of 1807, raised such suspicions of the validity of the appointment as required the Court, before it could adjudicate on the father's title to dispose of the estate, to direct an inquiry whether that appointment was a *bond fide* execution of the power.

*Power of
Appointment.
Inquiry
directed as to
its due
Execution.*

The House, in remitting a cause for inquiry on a main question, will, to save delay and expense, direct inquiries on other questions consequential on the probable finding on the main question.

BY indenture of settlement, dated the 22d of *June* 1780, executed upon the marriage of *William Marcus Jackson* with *Jane Devereux* (the late father and mother of the Appellant and first-named Respondent), after reciting (amongst other things) that *William Jackson* (their grandfather) was seised of and entitled

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to two several freehold interests, one in the lands of *Moylish*, and the other in the lands of *Clonlara*, both in the liberties of the city of *Limerick*, by virtue of two several leases for lives thereof respectively, with covenants for perpetual renewal; it was witnessed that in consideration of the marriage, and for the other considerations therein mentioned, *W. Jackson* conveyed unto *William Holland* and *Edward Jones* and their heirs and assigns, the said lands of *Moylish* and *Clonlara* with their appurtenances, to hold the same during the lives in the said several leases named, and the lives of such other persons as should thereafter be added pursuant to the said covenants for renewal, to the use of the said *W. M. Jackson* and his assigns during his life, and after his decease (charged with a jointure for the said *Jane*) to the use of all and every or such one or more of the children of the marriage, for such estate and estates, not exceeding an estate or estates in tail male and in such shares and proportions, with or without power of revocation, as the said *W. M. Jackson*, by any deed or writing under his hand and seal attested by two or more witnesses, or by his last will in writing, published and declared in the presence of three or more witnesses, should direct or appoint the same; and in default of such direction and appointment, or in case any such should be made, when and so soon as the estates and interests thereby limited should respectively end and determine; and as to such part or parts of the premises whereof no such direction or appointment should be made, to the use of the first son of the said *W. M. Jackson* by the said *Jane* and of the heirs male of the body of such first son with remainder to the use of the second and all and every other son and sons of the said *W. M. Jackson*.

by the said *Jane*, severally and successively in tail male; with several remainders over.

There was issue of the marriage four sons, namely, *William Devereux Jackson* (since deceased), the eldest; *George* (the Appellant), the second; the Respondent *Robert*, the third; and *Thomas* (since deceased), the fourth son; and no other issue. *William Devereux*, the eldest, attained his age of 21 years in *January* 1804.

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W. M. Jackson executed a deed-poll, dated the 14th of *January* 1804, whereby, after referring to the indenture of the 22d of *June* 1780, he, by virtue of the power thereby given to him, appointed, without power of revocation, the said lands of *Moylish* to *W. D. Jackson*, and to the heirs male of his body.

By an indenture of lease dated the 18th of *January* 1804, the father and son, in consideration of 1,600 *l.*, demised unto *Nicholas Mahon*, his heirs and assigns, part of the land of *Moylish*, for the lives of the several persons therein named, and the survivor of them, and for the lives and life of such other person or persons as should for ever thereafter be added to that demise pursuant to a covenant for perpetual renewal therein contained. And it was by this indenture agreed that so much of the 1,600 *l.* as should be sufficient should be laid out, first towards paying off all debts affecting the estate of *W. M. Jackson*; secondly, towards defraying the costs of renewing the leases for lives which he held of the lands of *Moylish* from the Earl of *Shelburne* with covenant for perpetual renewal, and out of which the interest demised by this indenture was derived, and paying such renewal fines as were then due from him to the Earl of *Shelburne* on his adding lives in the place of such as had not been supplied; so as to enable *W. M. Jackson* and *W. D.*

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Jackson, their heirs and assigns, to grant to *N. Mahon*, his heirs and assigns, the estate and interest intended to be demised to him. And *N. Mahon* covenanted with *W. M. Jackson*, his heirs and assigns, that he, *Mahon*, would at all times thereafter advance and pay all such money as should be necessary to procure renewals from the Earl of *Shelburne*; it being the intent and meaning of the parties that the fine so thereafter to be paid to the said Earl, his heirs and assigns, should at all times be paid by *Mahon*, his heirs and assigns, and no part thereof by *W. M. Jackson* and *W. D. Jackson*, their heirs and assigns.

By an indenture dated the 12th of *April* 1806 *W. M. Jackson*, by virtue of the indenture of settlement of the 23d of *June* 1780, appointed the lands of *Clonlara* to his said son, *W. D. Jackson*, and to the heirs male of his body, subject to his own life estate, and by this indenture they barred all entails of *W. D. Jackson* in those lands: and by two indentures of lease of the same date, *W. M. Jackson* and *W. D. Jackson*, in consideration of certain sums of money demised unto *John* and *Samuel Young* several parcels of the lands of *Clonlara* for the lives of the persons therein respectively named, and for the respective terms of 31 years from the decease of the survivor of them respectively, at reduced rents.

By an indenture, dated the 11th of *December* 1804, after reciting the deed-poll of the 14th of *January* 1804, the settlement of the 22d *June* 1780, and the indenture of appointment of the 12th *April* 1806, and that it had been found convenient by *W. M. Jackson* and *W. D. Jackson*, not only for the purpose of family settlements, but under certain agreements for leases of the lands of *Moylish* and *Clonlara* entered into and since concluded by them to certain

of the tenants of the said lands, who, for greater safety, were advised that the entails in the said several lands should be barred by means of the aforesaid deeds, and also for the purpose of enabling *W. M. Jackson* to pay off several debts and engagements incurred by *W. D. Jackson*: it was witnessed that *W. D. Jackson*, in consideration of the several debts by *W. M. Jackson* for him paid, and of 5s., and in discharge of the trusts and confidence reposed in him by *W. M. Jackson*, conveyed and assured unto *W. M. Jackson*, and his heirs and assigns, all the said lands of *Moylish* and *Clonlara*, with the appurtenances, and all the right, title and interest of him, *W. D. Jackson*, therein or thereto respectively.

W. D. Jackson died in 1815, intestate and unmarried and without issue; whereupon the Appellant became the eldest son of *W. M. Jackson*.

W. M. Jackson sold the lands of *Clonlara* in 1819 (the Appellant, then his eldest son, joining in the conveyance): and by his will, dated the 20th of *October* 1821, and attested by three witnesses, he gave and devised all his estate and interest in the lands of *Moylish* to the said *Jane* his wife, and to *Edward Gloster*, therein described, in trust that his said wife should receive during her life an annuity of 50*l.* (in addition to her jointure), to be paid out of that part of *Moylish* tenanted by *N. Mahon*; and upon further trust that the trustees should, after payment of that annuity, yearly receive out of *Moylish* 100*l.*, and place the same out at interest, until the sum of 550*l.* should be made up, to be applied in the manner hereinafter mentioned; and that when that sum should be made up, the testator declared that the said sum of 100*l.* should go to increase the jointure of his wife, and should be paid to her at the same times as

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the said sum of 50*l.* a year was thereinbefore made payable. And as to the residue of the rents of the lands of *Moylish* after the said sums of 50*l.* and 100*l.* annually, in trust to pay the same to the Appellant during the life of the testator's wife; but on her death and on the sum of 550 *l.* being raised out of the rents of the said lands of *Moylish* as aforesaid, the testator declared that the said *Edw. Gloster*, his heirs and assigns, should stand seised of the lands of *Moylish* to the use of testator's sons, the Appellant and the Respondent *R. Jackson*, during their natural lives respectively, to be held by them in equal portions as tenants in common, and not as joint tenants, with remainder to their legitimate issue, in such manner and form, shares and proportions, as the Appellant and Respondent should by deed or will direct or appoint: and on failure of legitimate issue of either of his said sons, the testator devised the share of him so dying without legitimate issue, to the other of them his heirs and assigns for ever. And as to the said sum of 550 *l.*, when the same should be raised out of the rents of *Moylish*, and as to a sum of 450 *l.* which the testator stated the said *Edw. Gloster* owed him, he gave and bequeathed these two sums, making together 1,000*l.* to his grand-daughters, the Respondents *Elizabeth* and *Maria Maunsell*, share and share alike, to be paid to them at their respective ages of 21 years or days of marriage, provided such marriage should take place with the consent therein mentioned; the interest to be paid to his said wife, and applied as she should please towards their education and maintenance, in the meantime. And the testator expressly devised the said sum of 1,000*l.* to his said grand-daughters in full discharge of any sum or sums of money claimed to be due by him to their father; and

he declared that should their father not deliver up any bonds, notes or other securities that he might have, cancelled, to his the testator's executors, or should he demand any of the said sums of money, or any part thereof, then the testator devised the said sum of 1,000*l.* to his residuary legatee. And as to all the residue of the testator's real, freehold and personal estate and property of every kind and nature whatsoever, which he should die seised and possessed of, or in any manner entitled to, and not thereinbefore disposed of, he devised and bequeathed such residue to his said wife, her heirs, executors, administrators and assigns, as his residuary legatee.

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W. M. Jackson executed another will on the 29th of *October* 1822, which purported to revoke all former wills, but contained no devise of the lands of *Moylish*, nor was it executed in the presence of three witnesses. He died in *November* 1822, and his wife died in 1833, leaving the Appellant and Respondent their only surviving children.

In *January* 1836, the Respondent *R. Jackson* filed his bill in the Court of Chancery in *Ireland* against the Appellant, and the Respondents *Elizabeth* and *Maria Maunsell*, stating (amongst other things) the several matters hereinbefore mentioned, and praying that the said will of the 20th of *October* 1821 might be declared well proved, and that the same might be established and the trusts thereof carried into execution; and that the Respondent *R. Jackson* might be declared to be entitled to an estate in *quasi* tail, in one moiety of the lands of *Moylish*, under the said will, and might be put into possession thereof accordingly; and that an account might be taken of the rents and profits received by the Appellant out of the

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said lands since the death of *Jane Jackson*, and that the said Respondent might be declared entitled to one moiety thereof, and that the Appellant might be decreed to pay the same; or if the Court should be of opinion that the deeds of the 14th of *January* 1804 and the 11th of *December* 1807, were void, then that the said will might be deemed and taken to be a valid execution of the power of appointment contained in the deed of the 22d of *June* 1780, and that the Respondent's rights might be declared thereunder.

The Appellant, in his answer to the bill, relied upon several grounds of defence; and amongst others insisted that the deed of appointment of the 14th of *January* 1804 was not made in *bonâ fide* execution of the power given by the marriage settlement of 1780, but was made to enable *W. M. Jackson* to derive benefit therefrom to himself, and also to enable him to have executed the several leases before mentioned, on which he received fines, and that the said deed was, for those reasons, fraudulent and void in equity; and that the deed of 1807 was executed in consideration of a corrupt agreement between *W. M. Jackson* and *W. D. Jackson*; and that in the event of the said deeds being declared void, the will of *W. M. Jackson* was not a good and valid execution of the power of appointment given him by the deed of 1780; and the said deed of appointment of 1804, though invalid as an appointment, yet was effectual to bar the right of *W. M. Jackson* to execute any further appointment of the lands of *Moylish* by deed or otherwise; and that the instrument executed by him in *October* 1822, though not executed so as to pass freehold estates, and though it might not be good as a revocation of the former will, yet afforded evidence that he was then conscious that the said deeds of 1804 and 1807 were liable to be impeached, and that he therefore design

edly omitted to make any mention of the said lands in the will of 1822.

The other defendants having respectively put in their answers to the bill, and the cause being at issue, witnesses were examined (a).

The cause came on to be heard before the Lord Chancellor of *Ireland*, on the 3d of *May* 1838, when, amongst other evidence offered to the Court on behalf of the Appellant, there was offered a decree of dismissal in a former cause of *Jane Jackson* against the Appellant and others; and the Respondent's counsel having objected to the same being read, the Court was pleased to reject it; and there having been also offered in evidence the attested copy of the will of the 29th of *October* 1822, the Court was pleased to reject the same as evidence; and it was then decreed by his Lordship that the will of the said testator of the 20th of *October* 1821 should be declared well proved, and that the trusts thereof should be carried into execution; and that the Respondent *R. Jackson* should be declared entitled thereunder to an estate *quasi* in tail in one moiety of the lands of *Moylish*, from the decease of the said *Jane Jackson*, and that an injunction should forthwith issue to put that Respondent in possession of such moiety accordingly; and that the Respondents *Elizabeth and Maria Maunsell* should be entitled to the legacy of 550*l.* bequeathed by the said will, and that the same was payable out of the rents and profits of the whole of the said lands of *Moylish*, received since the death of the testator; and it was referred to the Master to take an account of the rents of the said lands of *Moylish* received by the Appellant, or which without wilful default might have been received by him, as well from the decease of the

(a) They only stated that *W. M. Jackson* had been in want of money from 1802 to 1810.

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testator as since the decease of *Jane Jackson*. And it was further ordered that the Respondents *Elizabeth* and *Maria Maunsell* should be entitled to be paid by the Appellant the sum due to them on foot of the said legacy, if the amount thereof received, or which without wilful default might have been received by the Appellant during the life of *Jane Jackson*, should appear to have been sufficient for that purpose; and that an account should be taken of the sum due on foot of the said legacy; and that the Respondent should be entitled to a moiety of such sum as should have been so received, or which without wilful default might have been received by the Appellant since the death of *Jane Jackson*.

The Appellant appealed as well against the order rejecting the evidence as against the decree.

Mr. *Pemberton* and Mr. *Wakefield* (with whom was Mr. *Hardey*, of the *Irish Bar*), for the Appellant:—The deeds of appointment of the 14th of *January* 1804, and of the 12th of *April* 1806, were executed by *William Marcus Jackson* in fraud of the power of appointment reserved to him by the indenture of settlement of 1780, and upon a previous secret trust or agreement with his son *William Devereux Jackson* that such appointment was to be for the benefit of the father. Consequently such deeds of appointment, founded on such corrupt agreement, are void in equity; and as the deed of the 11th *December* 1807 was executed by *W. D. Jackson* in pursuance of such secret trust or agreement, that deed also is void in equity: yet the decree substantiated those deeds. The will of *William Marcus Jackson* of the 20th of *October* 1821 was intended by him to operate as a devise of the interest in the lands of *Moylish*, which he had fraudulently

acquired under the appointment of 1804 and the conveyance of 1807, and was not meant or intended by him to operate as an appointment under the power contained in the settlement of 1780, to which this will made no reference. The testator had no right to dispose of the lands which he had so fraudulently acquired. If the will was intended to take effect, and could take effect, as an appointment under the power contained in the settlement, yet the devises and bequests contained in the will in favour of the testator's wife, and of the Respondents *Elizabeth* and *Maria Maunsell*, were not authorised by such power, and consequently were void.

The bill only prayed an account of the rents and profits of the lands of *Moylish* from the decease of *Jane Jackson*; but it is directed by the decree that an account should be taken of the rents and profits of those lands, received by the Appellant, or which without wilful default might have been received by him, from the decease of *William Marcus Jackson*. That part of the decree is clearly erroneous.

[To show that leases of lives renewable for ever, in *Ireland*, are in the nature of perpetuities, out of which various estates are carved for family settlements, and that they are governed by the same rules that govern estates in fee simple in *England*, they cited *Boyle v. Lysaght*, 1 Ridgway, P. C. 384; *Burnell v. Lord Inchiquin*, 3 Ridg. 389; and *Lyne on Leases for Lives*, p. 7 *et seq.*]

Mr. *Knight Bruce* and Mr. *Eade*, for the Respondents:—This deed executed by *William Marcus Jackson* on the 14th of *January* 1804, was a valid appointment of the lands of *Moylish*; it recites the deed of *June* 1780, and is expressed to be in pursu-

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ance and execution of the power thereby given. Taken by itself, therefore, that deed of appointment cannot be questioned; but because the father and son join in executing, a few days afterwards, a lease of part of these lands to Mr. *Mahon*, suspicion is cast on the appointment as if it were in fraud of the power. Now there was no evidence in the cause to prove any such previous corrupt agreement as the Appellant alleges, or to connect the lease with the deed of appointment. The estate was incumbered and it became necessary to renew the lease from the Earl of *Shelburne*. To raise the necessary sums of money for these purposes, the father and son joined in the lease, which recites the uses to which the 1,600 *l.* were to be applied. The lessee had a right to insist on payment of the incumbrances, because he was purchasing the estate subject to the rent. The payment of the debts affecting the estate was for the benefit of the son. The transaction remained unquestioned from 1804, and it would require a strong case to set it aside, after thirty-six years, merely because the Appellant chooses to say it was fraudulent without producing any evidence of the fraud; particularly when all the parties to the transaction are dead.

It appears by the recitals of the deed of *December* 1807, that the father had paid off debts of the son. What was to prevent the father from taking a reconveyance of the estate? Was it not open to him to purchase the son's interest, as much as if he was a stranger? The conveyance put an end to the son's estate in the lands, without levying any fine.

If the Appellant had filed a bill against his father after the death of the eldest son, for the purpose of invalidating the appointment on the grounds now alleged, the Court might grant relief unless the

father could show it was a *bond-fide* execution of the power. No proceeding of that sort was taken. But supposing the appointment not effectual, the will under which the Respondent claims is a good execution of the power.

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Mr. *Pemberton*, in reply :—The will does not refer to the power, and does not purport to be an execution of it. The will, as far it relates to the estate of *Moylish*, proceeds on the assumption that the deeds of the 14th of *January* 1804, and of *December* 1807, are valid deeds; but both these deeds being invalid, the testator had no power of disposing by will of the estate.

The *Lord Chancellor* :—This case, as it appears on the examination of the pleadings, has come before your Lordships under peculiar circumstances. The suit is brought by a party claiming under his father's will, in which the father assumed the right of disposing of certain lands called *Moylish*. The answer to this claim is, that the lands were not the estate of the father; at least, not an estate over which he had a right to exercise the power of disposition by will, it being stated that he derived his title under a settlement by which he was tenant for life, with the power of appointing to one or more of his children in tail male. The father appointed in favour of his eldest son, and upon the face of that instrument there is nothing to impeach it. But other instruments are stated, which certainly throw great doubt upon the propriety of that transaction; because, by another deed of very nearly the same date, the father and son (the father then being tenant for life, and the son being entitled as tenant for life on the death of the father) joined

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together in granting a lease for three lives, renewable for ever, in consideration of 1,600*l.*; that 1,600*l.* being, in the very terms of the deed, to be applied in relieving the estate from certain debts of the father. At a subsequent period, I think in 1807, another deed was executed, which speaks of the conveyance to the son having been upon trust and confidence; and it is in fact a conveyance back to the father of the estate which had been so apparently appointed to the son. It also speaks of the fines by which the estate tail was barred; but as to those fines, under what circumstances they were suffered, or for what purpose they were applied, is only to be inferred from what is stated in that deed.

Now the decree assumes that this estate was the absolute property of the father, and directs that one moiety of the estate shall be held by the Respondent assuming that the title under the father's will was good. It also directs that the defendant shall account for a moiety of the rents from the death of the father although his title did not accrue till the death of the mother. Now the only ground upon which that can be explained is, that the will directed a sum of 100*l.* a year to accumulate until 550*l.* should be realised; that sum, when realised, to go to make up a sum of 1,000*l.* left to certain grand-children of the testator. I presume, although it is very indistinctly stated upon the pleadings and in the decree, that the object of that part of the decree was to relieve the estate of the plaintiff from that burthen, or any portion of the 550*l.* If that was the object of the decree, it is not in the shape and form in which it ought to be to carry out that object; because, if it was only for the purpose of relieving the estate of the plaintiff from that burthen of 550*l.*, or any portion of it, the first inquiry would

have been, what portion of that 550*l.* remained unpaid, and whether the income received by the defendant (always supposing the decree to be right upon the merits) between the interval of the death of the father and the death of the mother had or had not been sufficient for the purpose of meeting and providing for that charge? Because, if that charge had been provided for, and it had been ascertained that a sufficient amount of rent had been received for that purpose; if, for instance, the rents had amounted to ten times that sum, the mere fact of the defendant having received property equal to that sum would not have been a sufficient ground for the decree. That, however, I refer to only incidentally, because it does not appear to me a matter which can justify the shape which the decree has assumed.

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But on the merits of the case, I think the decree cannot be supported in its present form. The decree assumes that all these objections to the title of the father are of no avail. It decrees at once, upon the state of information then before the Courts, that all these transactions and appointments were valid, and that the father had by means of the appointment, and the title he got from the son, in whose favour the appointment was made, a valid title; and therefore decrees in favour of the plaintiff claiming under the will.

Now, without expressing any final opinion (because I do not think the case is as yet ripe for it) as to the effect of all these transactions, it is quite obvious that there is ample ground for suspicion. In the first place, these two deeds coming together, almost at the same moment; the appointment in favour of the son, and the deed by which 1,600*l.* was raised by fine upon that very estate, to be applied in satisfying the debts which were charged on the estate, which were the

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debts of the father, would of itself raise a strong suspicion that it was not an appointment by the father, honestly and fairly exercising the power which the settlement gave him, but that he was influenced in making the appointment by the benefit which he expected and contracted to receive for himself. But the deed of 1807 makes the case much stronger, because we there find the son restoring the estate to the father. It is true that that deed stated the father to have paid various debts of the son. That may or may not be true: it may be that the object of all this was to raise money to pay the son's debts; it may be that there was no intention to commit any fraud by this appointment; but whether the recital was true or not the Court has no means of judging; for there is no evidence in the cause, there is nothing before the Court to enable it to form any opinion as to the validity of these transactions, but what appears upon the face of the instruments themselves.

Under these circumstances we are left entirely in the dark whether any title was obtained independently of this appointment; for it appears that the son was tenant in tail under the appointment. One argument was, that, supposing the appointment were entirely out of the question, the father and the son together had, by means of the estate, independently of the appointment, the means of procuring an absolute dominion over the property. But under what circumstances all these transactions took place is without any proof, except so far as they are stated in those deeds to which I have referred. Therefore, under these circumstances, and with the facts appearing upon these deeds, I think it was too much for the Court to assume that the title of the father was good, and therefore that, as it respected the parties claiming under the will, it was property of which the father had an abso-

After the death of the lender, two of his sisters, by an arrangement with the rest of the family, who were the legatees of the lender, became possessed of the security, and applied to the attorney to do what was necessary. The means taken to secure the repayment of the loan, on this continuation of it, were insufficient. Held, that as representing the interest of the deceased, and on their own account, the sisters were entitled to compensation from the attorney.—*Donaldson v. Haldane*, p. 761.

BANK.

A partnership consisting of more than six persons, carrying on the business of bankers in or within 65 miles of *London*, cannot, without violating the Acts of Parliament respecting the Bank of *England*, accept, in the course of such business, a bill of exchange payable at less than six months from the time of such acceptance.

Whatever is prohibited by law to be done directly, cannot legally be effected by an indirect and circuitous contrivance.

A *London* Joint Stock Bank, consisting of more than six partners, entered into an agreement with a bank in *Canada*, that *G. P.*, manager of the *London* Joint Stock Bank, but not a partner therein, should accept bills drawn on him by the *Canada* bank, payable at less than six months from the acceptance thereof; and that the *London* Joint Stock Bank would provide funds for the due payment of such bills; the money transactions arising thereupon being, in the accounts between the two banks, to be treated as transactions between the said banks. Held by the Lords (affirming the judgment of the Master of the Rolls),

1. That the acceptance of such bills, in execution of such agreement, was unlawful, regard being had to the Acts in force respecting the Bank of *England*.

2. That such acceptances would not be lawful, even if the *London* Joint Stock Bank, at the time of the acceptances, had in hand funds on account of the bank in *Canada* equal to the amount of the bills so accepted.

3. That the acceptances of such bills would not be lawful if the *London* Joint Stock Bank had not, at the time of the acceptances, any funds in hand belonging to the bank in *Canada*, but the bills were accepted on the credit of a

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of *Jane*, the widow, were sufficient to pay the said. These inquiries, it is true, would not arise until question of title had been decided; but I think it would be expedient, in order to save time, that the Master should at the same time pursue that inquiry.

Mr. Wakefield:—Will your Lordships allow me to remind you that the decree directed an injunction which put the Respondent into possession of moiety of the lands? and I believe that has been carried into effect.

Lord Chancellor:—We cannot interfere with that that rests with the Court of Chancery: we set aside the decree so far as it is appealed from.

[It was then ordered and adjudged that the said decree be reversed; but it was declared that, before adjudication upon the plaintiff's title under the will, there should be an inquiry before the Master whether the title the testator had at the time of his death in the lands of *Moylish*, and how the same was derived; particularly whether the appointment of those lands in favour of the son, *William Devereux Jackson*, was a good and valid appointment; with liberty to state special circumstances: and further, that there should be an inquiry before the Master whether the 550*l.* any and what part thereof, is or was due at the time of the death of the testator, and what is now due in respect thereof, and whether the rents received by said *George Jackson*, during the lifetime of *Jane*, the widow, were sufficient to pay the same. And with this declaration, it was further ordered that the cause be remitted back to the Court of Chancery in Ireland to do therein as shall be just and consistent with this declaration.]

CORPORATION. *See* BANK.

1. Where a party is in the legal and undisputed possession of a municipal office, it is competent for him, by suspension and interdict, to protect his office against the unauthorised intrusion of a party who has no title to the office: but it does not put into office a party who has the abstract right to it.—*Fleming v. Dunlop*, p. 43.

2. A bill of suspension and interdict is an incompetent procedure to try and determine the merits of contested municipal elections.—*Id. ibid.*

Procedure by bill of suspension and interdict cannot be taken against a party in possession of an office, to question his right thereto, by a party who is not in possession; nor can it apply to a case where neither party is in possession, nor to acts done anterior to the act of election; nor can the right of election be decided by it.—*Id. ibid.*

3. An interlocutor passing a bill of suspension and granting interdict is subject to appeal to the House of Lords, within the 48 *Geo.* 3, c. 151.—*Id. ibid.*

4. By Act 5 & 6 *Will.* 4, c. 76, s. 71, it is enacted that all the estate and interest of such bodies corporate, or members thereof, as were seised or possessed of any real or personal estate in trust for charitable uses, should, in respect of such uses and trusts, continue in the persons who at the time of passing the Act (1835) were such trustees, until the 1st day of *August* 1836, or until Parliament should otherwise order, and should thereupon utterly cease and determine: Provided that, if Parliament should not otherwise direct on or before the said 1st of *August*, the Lord Chancellor or Lords Commissioners of the Great Seal should make such orders as they should see fit, for the administration, subject to such charitable uses and trusts as aforesaid, of the said charity estates and funds. Parliament did not pass any subsequent Act on the subject before the 1st of *August* 1836. Held that the administration of the charity estates and funds did not continue in the persons so described, after the 1st of *August* 1836; and that it was competent to the Lord Chancellor, after that day, to make orders for the appointment of new trustees for their administration.—*Bignold v. Springfield*, p. 71.

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1. Where an Appellant has succeeded in dismissing a petition against the competency of his appeal, and the appeal is afterwards dismissed with costs on the hearing on the merits, those costs do not include the costs of discussing the question of competency, unless the consideration of them has been reversed.—*Campbell v. Campbell*, p. 186.
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3. An appeal was called on in its regular course; the Appellant's counsel were not present, but he appeared in person. The House would not dismiss the appeal, but allowed it to stand over, and ordered the Appellant to pay the costs of the day.—*Godson v. Hall*, p. 549.
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CREDITORS' DEED.

The execution of a trust deed for (among other things) the payment of creditors, does not constitute one of the creditors, who became so after the execution of the deed, and was not a party to it, a *cestui que* trust, entitled to call on the trustee to execute the trusts of the deed.

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3. That the acceptances of such bills would not be lawful if the *London* Joint Stock Bank had not, at the time of the acceptances, any funds in hand belonging to the bank in *Canada*, but the bills were accepted on the credit of a

contract by that bank to remit funds to meet such acceptances before the bills became payable.

4. That the Bank of *England* might maintain an action against the *London Joint Stock Bank*, founded on such transactions.—*Booth v. The Bank of England*, p. 509.

BOND.

1. The rule as to the liability of sureties in a bond is the same in *Scotland* as in *England*; namely, that they are not to be discharged from their obligations unless the contract between them and the obligees is varied by a positive contract between the obligees and the principal, without notice to the sureties. It is the duty of a surety to see that his principal does his.—*Creighton v. Rankin*, p. 325.
2. The bond given by a collector and his sureties to the Commissioners of Land and Assessed Taxes under the 43 *Geo.* 3, c. 99, is broken if the taxes collected in any one year are not duly paid up by the collector to the account of that year.

The breach of the condition of the bond is equally complete, and the sureties are equally liable, though all the monies collected in the year for which they are sureties should be in fact paid in, if any part of them should be appropriated by the collector, and received by the Commissioners, in satisfaction of the arrears of a former year.

Such appropriation of part of the monies of one year to the payment of the arrears of a former year, will not prevent the Commissioners from maintaining an action on the bond against the sureties for the year in which the money collected has been so misappropriated.

The Commissioners may come upon the sureties after they have sold the lands and goods of the collector, but the seizure and sale of his lands and goods is a condition precedent to their right of action against the sureties, and they are not entitled to require notice of such lands and goods in order to perform the condition.—*Grwynne v. Burnell*, p. 572.

CHANCERY ORDERS IN THE MATTER OF CHARITY ESTATES. *See* CORPORATION, 4.

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CONSIDERATION. *See* DEED, 3. HEIR. INQUIRY BY THE MASTER. SECURITIES.

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2. *Seemle*, that in the Courts of *Scotland*, as in *England*, one partner of a dissolved company has no title to sue in his own name another partner or stranger to the company, in respect of advances made by the company.—*Stewart v. Gibson*, p. 707.

INQUIRY BEFORE MASTER. *See PRACTICE.*

A., being tenant in tail of large estates expectant on the death of his father, in consideration of 6,000 *l.* and 10,000 *l.* advanced to him by *O.*, charged the estates with 12,000 *l.* and 20,000 *l.* to be paid only in the event of surviving his father, who was about 80 years of age, *A.* being about 43; and he granted to *R.*, his agent in these transactions, in consideration of his services, an annuity charged on the same estates. *R.* assigned the annuity to *O.* for valuable consideration. *O.* filed a bill against *A.*, after his father's death, to enforce these securities; and *A.* filed a cross bill to set them aside, charging that *O.* and *R.* took advantage of his distress, and that no adequate consideration was given him for the *post-obit* securities, and no consideration for the annuity: and at the hearing he gave evidence that the consideration for the two sums of 12,000 *l.* and 20,000 *l.* was not the full value according to the tables and calculations of actuaries. *O.* gave no evidence.—

Held, that the Court, in the absence of evidence to enable it to decide the question, exercised a proper discretion in directing the Master to inquire what, at the time of the transaction, was the fair market price of the two sums so secured to be paid, regard being had to the ages of *A.* and of his father, and to the circumstances of the estates and *A.*'s interest in them.—*Earl of Aldborough v. Trye*, p. 436.

2. A person seeking the benefit of a dealing with an heir expectant, for his expectancies, must show that he gave him an adequate consideration, which is the fair market price at the time of dealing, and not the value according to the calculations of actuaries on the tables.—*Id. ibid.*
3. The rule that a fair price is to be given, is sufficient protection to an heir expectant or reversioner; but the rule of full value would not be any protection, as in that case they could not deal with their expectancies or sell their interest at all.—*Id. ibid.*
4. A sale by public auction is within the proper rule, on the

plain principle that the sum which the thing will fetch is the sum which it is worth.—*Earl of Aldborough v. Trye*, p. 436.

5. A party comes too late to complain of a decree after joining in the inquiry directed by it, and the result is against him ; and he is not entitled to question the Master's report after it is confirmed, having taken no exceptions.—*Id. ibid.*
6. A person being by his marriage settlement tenant for life of an estate in *Ireland*, held on lease for lives renewable for ever, with power of appointment to one or more of the children of the marriage ; the estate, in default of appointment, to go to the first and other sons successively in tail male ; by deed poll dated the 14th of *January* 1804, appointed to his eldest son an estate in tail male ; and by indenture of lease executed four days after, the father and son, in consideration of 1,600 *l.*, to be applied in paying debts on the estate and renewable fines then due, demised part of it for lives. By a deed dated *December* 1807, the son, in consideration of debts paid for him by the father, and in discharge of the trust and confidence reposed in him, conveyed the estate and all his interest therein to the father and his heirs. The father, by his will, made after the death of his eldest son without issue, devised the estate, charged thereby with certain legacies, to the use of his two surviving sons and their respective issue, in equal portions, as tenants in common. Held by the Lords (reversing a decree which established the will) that the execution of the lease for 1,600 *l.* so soon after the deed of appointment, and the circumstances appearing in those deeds, and in the deed of reconveyance of 1807, raised such suspicions of the validity of the appointment as required the Court, before it could adjudicate on the father's title to dispose of the estate, to direct an inquiry whether that appointment was a *bond fide* execution of the power.—*Jackson v. Jackson*, p. 977.

JURISDICTION. See APPEAL.

1. A bill was filed in Chancery in *Ireland*, impeaching leases and mortgages as not in due execution of powers in a settlement ; also impeaching, on various grounds, a decree of the Court of Exchequer, and a sale in pursuance thereof, of the mortgaged estates, subject to the leases. When the cause came to be heard, the plaintiff's counsel informed the Court that no judgment would be required as between the

plaintiff and mortgagees, an arrangement being in progress by which the mortgagees and purchaser under the Exchequer decree consented to a redemption of the estates, on payment by the plaintiff of a sum certain. The Lord Chancellor then heard counsel as to the validity of the leases, but conceiving that the consideration of the question as to the validity of the mortgages and sale was withdrawn by the arrangement, and that in the absence of the purchaser he had no jurisdiction to give a decision on the leases, he dismissed the bill as against the defendants claiming the benefit of them.—

Held by the Lords, on an appeal against a decree made on rehearing, which reversed the decree of dismissal, that it was open to the Lords to consider the merits of this decree though not appealed from, and to declare that the arrangement, instead of withdrawing from the consideration of the Court the plaintiff's claim to relief against the mortgages and sale, was an admission of his right to that relief; that the decree of dismissal was therefore erroneous, and that it was competent to the Lord Chancellor, at the time of making that decree, to adjudicate as to the validity of the leases; and the cause was remitted to the Court of Chancery, to be heard on that question.—*Sheehy v. Lord Muskerry*, p. 1.

2. The House of Lords will on appeal interfere with the practice of the Courts below in respect of procedure, when the form of procedure admitted below appears to be incompetent and to lead to dangerous results.—*Fleming v. Dunlop*, p. 43.
3. After the 1st day of *August* 1836, it became competent to the Lord Chancellor, under the 5 & 6 *Will.* 4, c. 76, s. 71, to make new appointments of trustees of charity estates and funds theretofore administered by corporations.—*Bignold v. Springfield*, p. 71.

LEASE. See **PLEADING.** **TREES.**

An agreement in a lease for lives, "that, upon the renewing or inserting of any life or lives, a certain sum shall be paid by the lessee, his heirs and assigns, to the lessor, his heirs and assigns," does not amount to a covenant for perpetual renewal.—*Smyth v. Nangle*, p. 405.

LEGATEES, ACTIONS BY.

An attorney, who was the ordinary attorney for a borrower, also acted in the matter of a particular loan for the lender,

having answered that he “knew *Glasgow-field*, and never knew of any damage done there,” he was then asked “whether he had known of any sum having been paid by the defenders to the proprietors of *Glasgow-field*, for alleged damage there occasioned by their works?”—

Held by the House of Lords (overruling the judgment of the Court of Session) that the question was incompetent, as leading to a new collateral inquiry, which, answered either way, could not affect the issue or test the credit of the witness: if he answered that money had been paid, the payment would not be proof of damage done, as it might have been paid to buy peace.—*Tennant v. Hamilton*, p. 122.

Evidence is not to be received of admissions or declarations made by parties, and not put in issue by the pleadings.—*Copland v. Toulmin*, p. 850.

EXECUTION OF INSTRUMENT. See **DEED**, 2. **TRUST**.

EXECUTOR. See **DEED**, 1.

HEIR. See **CONSIDERATION**.

A person seeking the benefit of a dealing with an heir expectant, for his expectancies, must show that he gave him an adequate consideration, which is the fair market price at the time of dealing, and not the value according to the calculations of actuaries on the tables.—*Earl of Aldborough v. Trye*, p. 436.

The rule that a fair price is to be given, is sufficient protection to an heir expectant or reversioner; but the rule of full value would not be any protection, as in that case they could not deal with their expectancies or sell their interest at all.—*Id. ibid.*

A sale by public auction is within the proper rule, on the plain principle that the sum which the thing will fetch is the sum which it is worth.—*Id. ibid.*

ILLEGAL ADVENTURE. See **BANK**. **INDEMNITY**. **PARTNER**.

INDEMNITY.

1. Partners in a licensed brewery, convicted of a breach of the revenue laws, consented to a mitigated penalty. *Semble*, that a partner who was not a participator in the delict, was legally entitled to indemnity from those who were, although he consented to the penalty.—*Campbell v. Campbell*, p. 166.

2. *Seemle*, that in the Courts of *Scotland*, as in *England*, one partner of a dissolved company has no title to sue in his own name another partner or stranger to the company, in respect of advances made by the company.—*Stewart v. Gibson*, p. 707.

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A., being tenant in tail of large estates expectant on the death of his father, in consideration of 6,000 *l.* and 10,000 *l.* advanced to him by *O.*, charged the estates with 12,000 *l.* and 20,000 *l.* to be paid only in the event of surviving his father, who was about 80 years of age, *A.* being about 43; and he granted to *R.*, his agent in these transactions, in consideration of his services, an annuity charged on the same estates. *R.* assigned the annuity to *O.* for valuable consideration. *O.* filed a bill against *A.*, after his father's death, to enforce these securities; and *A.* filed a cross bill to set them aside, charging that *O.* and *R.* took advantage of his distress, and that no adequate consideration was given him for the *post-obit* securities, and no consideration for the annuity: and at the hearing he gave evidence that the consideration for the two sums of 12,000 *l.* and 20,000 *l.* was not the full value according to the tables and calculations of actuaries. *O.* gave no evidence.—

Held, that the Court, in the absence of evidence to enable it to decide the question, exercised a proper discretion in directing the Master to inquire what, at the time of the transaction, was the fair market price of the two sums so secured to be paid, regard being had to the ages of *A.* and of his father, and to the circumstances of the estates and *A.*'s interest in them.—*Earl of Aldborough v. Trye*, p. 436.

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of it), a party having himself a right to sue, can enable another to maintain a suit in such other person's name, without assigning to him the subject-matter of the suit, consequences inconsistent with the principles of justice would flow from such practice.—*Creighton v. Rankin*, p. 325.

The treasurer appointed by district-road trustees having absconded with the trust funds, Held (affirming the judgment of the Court below) that a cautioner for the faithful discharge of his office was liable to the trustees for the balances due from the treasurer, although at several prior audits of his accounts they were guilty of neglect of their duty, by allowing him to retain in his hands balances far exceeding the amount allowed by the terms of the bond of caution, without requiring payment and without notice to the cautioner.—*Id. ibid.*

The rule as to the liability of sureties in a bond is the same in *Scotland* as in *England*, viz. that they are not to be discharged from their obligations unless the contract between them and the obligees is varied by a positive contract between the obligees and the principal, without notice to the sureties. It is the duty of a surety to see that his principal does his.—*Id. ibid.*

The *Edinburgh* Police Act, 2 *W.* 4, c. 87, does not make the Commissioners responsible, through their collector, for the misconduct of one of the police constables.—*Thomson v. Mitchell*, p. 564.

PARTIES. See DISCOVERY, BILL OF. PLEADING.

PARTNER. See APPEAL, 3. BANK. INDEMNITY.

Partners in a licensed brewery, convicted of a breach of the revenue laws, consented to a mitigated penalty. It seems that a partner who was not a participator in the delict, was legally entitled to indemnity from those who were, although he consented to the penalty.—*Campbell v. Campbell*, p. 166.

An *American* ship was fitted out in the port of *Liverpool* and sent to the coast of *Africa*, in 1806, on a joint adventure for trafficking in slaves. An *English* ship was sent at the same time, by the same parties, with arms and ammunition, to be at the disposal of the supercargo of the *American* ship; security having been given to the Admiralty that they were to be expended in trade on the coast of *Africa*. On the arrival of the two ships in the river *Congo*, the arms and ammunition were transhipped on board

the *American* ship, which was thereupon seized by a *British* privateer, and ultimately condemned as contraband.—Held, that the whole transaction was illegal, and that no action for contribution or account, in regard thereto, could be maintained by any of the parties concerned, against the others.—*Stewart v. Gibson*, p. 707.

PARTNERSHIP ACCOUNTS.

R. and *A. T.* having carried on the business of navy agents, as partners, in equal shares, and *R.* having retired, leaving the partnership accounts unsettled, with balances due to the firm from its customers, *A. T.* took *C.* into partnership, the customers accounts were transferred to the new partnership-books, and the business was carried on as before until *A. T.*'s death, without any agreement in writing or settlement of accounts between these partners or other evidence to show their shares in the concern. On a bill being filed by *A. T.*'s representatives against *C.* for an account, he stated that the agreement was, if *A. T.* would bring into the partnership 40,000 *l.* of good debts, due from the customers to the former partnership, his share in the concern should be two-thirds, and *C.*'s one-third, otherwise they should have equal shares; and that in consequence of *A. T.*'s not bringing in the 40,000 *l.* of good debts, the agreement was varied accordingly. There were entries in the accounts debiting the partners equally with the prices of wines purchased, and with losses on transactions in the public funds; and one witness said that *C.* directed him in *A. T.*'s presence to make up the general partnership accounts in equal shares.—

Held, that as it was established by a judgment in a former appeal that the 40,000 *l.* of good debts were brought into the new partnership, according to the agreement, the event in which it was to be altered never occurred; and as the accounts were uniform and contained no evidence of an alteration, the partnership was continued in the proportion of two-thirds to *A. T.*, and one third to *C.*

Held also, that in taking the accounts between *C.* and *A. T.*, and between them and the former firm, the monies paid in by the customers of both firms, without specific appropriation or contract, were to be applied first in discharge of their debts to the former firm, according to the rule in *Clayton's* case, although *A. T.*, in an affidavit made by him in a suit between himself and *R.*'s representative, swore that it was

for the purposes of the children's education, in *Penrith* in *Cumberland*, and, when not in *London* attending his Parliamentary duties, was frequently staying at *Penrith*. In 1808 he executed a marriage contract, in which he was described as "of *Logan*" (*Scotland*), of the one part; and she was described as "*M. R.*" (her maiden name) "residing at *Penrith, Cumberland, South Britain*, of the other part." No other ceremony of marriage took place, but he shortly afterwards carried her to *Scotland*, and introduced her and the children as his wife and children. Held, that he had not lost his *Scotch* domicile; that his marriage was a *Scotch* marriage, and that his children were consequently entitled to succeed as heirs to *Scotch* estate.—*Dalhousie v. M'Douall*, p. 817.

A *Scotch* gentleman of rank and fortune left *Scotland* in 1794, and came on a visit to *London*. In the course of that year he became acquainted with an *English* lady. In 1795 he took lodgings for her in *London*, where, in 1796, a child, the fruit of their intercourse, was born. He then took a house on lease, and furnished it, and continued to reside in that house with her till 1801, unmarried. In *September* of that year he married her in an *English* church. In 1802 he returned to *Scotland*, taking with him his wife and child, and settled himself in his patrimonial mansion. During the whole period of his residence in *London*, he had been accustomed to write letters to *Scotland*, declaring from time to time his immediate intention to return, and desiring things to be done which could only be necessary on that account. Held, that he had not lost his *Scotch* domicile, and therefore that his marriage was in all respects a *Scotch* marriage, and his child capable of succeeding as his lawful heir to entailed estates.—*Munro v. Munro*, p. 842.

LIMITATIONS, STATUTE OF.

To a bill filed for tithes against occupiers of lands, in *July* 1833, the owner was made a defendant by amendment in *January* 1835. *Quære*, whether he was defendant to a suit commenced within the time limited by the Act 2 & 3 *Will.* 4, c. 100, s. 3; that is, within a year from the 7th of *August* 1832.—*Plowden v. Thorpe*, p. 137.

MARRIAGE. See LEGITIMATION.

under advice of counsel for each; that *R. P.* read it and heard it read before he executed it, and afterwards as well as before expressed his desire that the estate of *C.* should be united to the estate of *R.* and go to his eldest son.—

Held by the Lords (reversing a decree which dismissed the bill), that *R. P.* tendered a false defence, and that all the matters put in issue by his answer were disproved by the evidence.—*Persse v. Persse*, p. 279.

3. The agreement to sue out the commission was not void or illegal for champerty or maintenance, or as against public policy, or fraud on the jurisdiction in lunacy, or want of mutuality. Regard being had to the ages and relative situation of the parties, and to the benefits secured by the issuing of the commission, there was some, and not very inadequate consideration for the covenant.—*Id. ibid.*
4. Held (affirming the judgment of the Court of Session), that a defender whose name is omitted *per incuriam* from the conclusions of the summons, is not to be permitted to have recourse to that omission as a fatal objection to the whole process, after his defences preliminary and on the merits have been repelled. The defect was cured by the acts and acquiescence of the defender and of his representative sisted in his place.—*Creighton v. Rankin*, p. 325.
5. A tenant of lands in *Ireland*, under the seventh renewal of a lease made in 1672, not in existence, but admitted to contain an agreement as to the amount of fine to be paid “upon the renewing or inserting of any life or lives,” filed a bill for renewal against the lessor’s assigns, and, referring to the recitals of that agreement in former renewals as evidence of the covenant contained in the original lease, prayed that that covenant be decreed to be a covenant for perpetual renewal.—

Held, that the case so made, and the issues tendered by the bill, were confined to the construction of the agreement as to the amount of the fine contained in the lease of 1672, and identified by the reference to the recitals of it in the renewals; and did not warrant either of two issues directed by the Court below, to try, 1st, whether at or before the making of the lease of 1672 (which was previous to the Statute of Frauds in *Ireland*), there was an agreement between the parties for a lease of lives renewable for ever: 2dly, whether that lease contained any agreement or cove-

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PARTIES. See **DISCOVERY**, **BILL OF**. **PLEADING**.

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Held, that as it was established by a judgment in a former appeal that the 40,000 *l.* of good debts were brought into the new partnership, according to the agreement, the event in which it was to be altered never occurred; and as the accounts were uniform and contained no evidence of an alteration, the partnership was continued in the proportion of two-thirds to *A. T.*, and one third to *C.*

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11. An appeal was called on in its regular course; the Appellant's counsel were not present, but he appeared in person. The House would not dismiss the appeal, but allowed it to stand over, and ordered the Appellant to pay the costs of the day.—*Godson v. Hall*, p. 549.
12. By a settlement made on the marriage of *A.*, certain premises were assigned to trustees for his use for life; and power was also given him "to raise by deed, mortgage, or any other writing, a sum of 1,000 *l.*, to be applied to any purpose that the said *A.* should please, but the same was not to be raised by way of sale of the said lands." *A.* raised the 1,000 *l.* by way of mortgage of the settled premises, and afterwards became bankrupt; his assignee sold his interest as such assignee, in the settled premises, to *B.*, who also purchased the mortgage; *A.* afterwards died.

The Court below having directed an inquiry into the value of the estate at the time of the assignment, and the amount of *B.*'s interest therein, this House reversed the order directing such inquiry, and, without making any order, remitted the case with the declaration of what were the nature and extent of *B.*'s rights, leaving it to the Court below to carry that declaration into effect.—*Simpson v. O'Sullivan*, p. 550.

18. The Court below, in which the action is brought, may award a repleader, but a Court of Error cannot award it.—*Gwynne v. Burnell*, p. 572.

The House, in remitting a case for inquiry on a main question, will, to save delay and expense, direct inquiries on other questions consequential upon the probable finding on the main question.—*Jackson v. Jackson*, p. 977.

REHEARING. See PRACTICE, 2.

REPLEADER. See PRACTICE, 12.

REVOCATION OF WILL. See WILL.

ROAD ACTS. See OFFICER.

SECURITIES.

- A.* being tenant in tail of large estates expectant on the death of his father, in consideration of 6,000 *l.* and 10,000 *l.* advanced to him by *O.*, charged the estate with 12,000 *l.* and 20,000 *l.*, to be paid only in the event of surviving his father, who was about 80 years of age, *A.* being about 43;

under advice of counsel for each; that *R. P.* read it and heard it read before he executed it, and afterwards as well as before expressed his desire that the estate of *C.* should be united to the estate of *R.* and go to his eldest son.—

Held by the Lords (reversing a decree which dismissed the bill), that *R. P.* tendered a false defence, and that all the matters put in issue by his answer were disproved by the evidence.—*Persse v. Persse*, p. 279.

3. The agreement to sue out the commission was not void or illegal for champerty or maintenance, or as against public policy, or fraud on the jurisdiction in lunacy, or want of mutuality. Regard being had to the ages and relative situation of the parties, and to the benefits secured by the issuing of the commission, there was some, and not very inadequate consideration for the covenant.—*Id. ibid.*

4. Held (affirming the judgment of the Court of Session), that a defender whose name is omitted *per incuriam* from the conclusions of the summons, is not to be permitted to have recourse to that omission as a fatal objection to the whole process, after his defences preliminary and on the merits have been repelled. The defect was cured by the acts and acquiescence of the defender and of his representative sisted in his place.—*Creighton v. Rankin*, p. 325.

5. A tenant of lands in *Ireland*, under the seventh renewal of a lease made in 1672, not in existence, but admitted to contain an agreement as to the amount of fine to be paid “upon the renewing or inserting of any life or lives,” filed a bill for renewal against the lessor’s assigns, and, referring to the recitals of that agreement in former renewals as evidence of the covenant contained in the original lease, prayed that that covenant be decreed to be a covenant for perpetual renewal.—

Held, that the case so made, and the issues tendered by the bill, were confined to the construction of the agreement as to the amount of the fine contained in the lease of 1672, and identified by the reference to the recitals of it in the renewals; and did not warrant either of two issues directed by the Court below, to try, 1st, whether at or before the making of the lease of 1672 (which was previous to the Statute of Frauds in *Ireland*), there was an agreement between the parties for a lease of lives renewable for ever: 2dly, whether that lease contained any agreement or cove-

2. That privy tithes are not personal tithes, but are the same as small tithes.
3. That where there is evidence that the vicarage was endowed with small tithes, the vicar's right to them is established against all lands within the parish as to which no particular discharge is proved; although no small tithes have ever been paid.
4. Where any of the defendants proved a particular discharge of the lands in his occupation, or showed they were originally part of the glebe lands, the vicar's bill against them was dismissed with costs, but without costs as to such defendants as did not make and prove that defence in the Court below.—*Clee and others v. Hall*, p. 744.

To a rector's bill against the owner and occupiers of lands for an account of tithes, they by their answers set up an agreement, made in 1711, between the then rector and the owner of the lands (who was also patron of the living), by which certain lands and a perpetual annuity were given to the rector in exchange for his glebe lands, and for the discharge from tithes of the lands occupied by the defendants. The agreement continued to be beneficial to the church, having been made with reference to the probable future increase in the value of the tithes: it was approved by the Ordinary and established by a decree of the Court of Chancery, and acted on down to the filing of the bill, when the rector refused to accept the annuity, but still retained the lands which were allotted to him in the exchange, and which were much more valuable than the old glebe lands.—Held, that although it was open to the rector to put an end to the agreement, as being void under the disabling statutes, he was not entitled to the aid of equity to enforce his legal title to the tithes while he retained part of the consideration for their discharge, contrary to the principle "that he who seeks equity must do equity."—*Plowden v. Thorpe*, p. 137.

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3. The House of Lords will, on appeal, interfere with the practice of the Courts below in respect of procedure, when the form of procedure admitted below appears to be incompetent and to lead to dangerous results.—*Fleming v. Dunlop*, p. 43.
4. *Semble*, that a partner who was not a participator in the delict was legally entitled to indemnity from those who were, although he consented to the penalty. But held, that by having omitted all opportunities of taking a decision on the legal question in the Court below, and being unable to appeal against the verdict, he was precluded from having a decision on that question from the House of Lords.—*Campbell v. Campbell*, p. 166.
5. A party, after failing in the defence set up by his answer, is not to be permitted to try another defence depending on matters not put in issue by the answer, and which, therefore, his adversary had no opportunity of disproving.—*Persse v. Persse*, p. 279.
6. It requires a very strong case to induce the Lords to reverse a decree nine years after its date, especially if that decree established no fact, adjudicated no right, but merely directed proper inquiries to obtain information for the Court, and the objects of it were exhausted, the Appellant himself having joined in the inquiries and failed.—*Copland v. Toulmin*, p. 350.
7. It is irregular, by an exception to a report, to raise a proposition foreign to the subject-matter of the report.—*Id. ibid.*
8. A party comes too late to complain of a decree after joining in the inquiry directed by it, and the result is against him ; and he is not entitled to question the Master's report after it is confirmed by decree, having taken no exceptions to it.—*Earl of Aldborough v. Trye*, p. 436.
9. It is improper to print in the appeal cases, or appendix, the interrogatories in a bill, or other unnecessary matter.—*Booth v. The Bank of England*, p. 509.
10. If the second counsel for an Appellant cannot attend in his turn, the House will hear him afterwards in reply to the Respondent's counsel, but will confine him strictly to the reply.—*Id. ibid.*

respects, and confirmed it in every other. Next day he made a second codicil, by which he gave some pecuniary and specific legacies, and concluded thus: "All the rest and residue of my property, not hereinbefore (or by my will or any other codicil) disposed of, I give and bequeath to my nephew, *C. P. Y.* and to Sir *C. E. D.*, their executors, administrators and assigns, after the death of my said dear wife, equally to be divided between them." Held (the Lord Chancellor *dissentiente*), that the above clause of the second codicil was a revocation of the gift, by the will of the residue to Sir *C. E. D.*, and that he was accordingly only entitled to an equal share thereof with *C. P. Y.*—*Earl of Hardwicke v. Douglas*, p. 795.

END OF VOL. VII.

and he granted to *R.*, his agent in these transactions, in consideration of his services, an annuity charged on the same estates. *R.* assigned the annuity to *O.* for valuable consideration. *O.* filed a bill against *A.*, after his father's death, to enforce these securities ; and *A.* filed a cross bill to set them aside, charging that *O.* and *R.* took advantage of his distress, and that no adequate consideration was given him for the *post-obit* securities, and no consideration for the annuity : and at the hearing he gave evidence that the consideration for the two sums of 12,000*l.* and 20,000*l.* was not the full value, according to the tables and calculations of actuaries. *O.* gave no evidence.—

Held that the Court, in the absence of evidence to enable it to decide the question, exercised a proper discretion in directing the Master to inquire what, at the time of the transaction, was the fair market price of the two sums so secured to be paid, regard being had to the ages of *A.* and of his father, and to the circumstances of the estates and *A.*'s interest in them.—*Earl of Aldborough v. Trye*, p. 436.

STATUTE, CONSTRUCTION OF. *See* **BOND, 2.** **CORPORATION.** **OFFICER.** **TREES.**

SURETY. *See* **BOND.**

TITHES.

To a vicar's bill for an account of all small tithes, the defendants answered that the right to all tithes, as well small as great, became vested in the rector and in the owners of the lands, by grants and conveyances, and that they and their tenants held the lands with the tithes, or free from all tithes whatsoever ; but that some occupiers paid annually to the vicar, in respect of their houses, certain small sums in the name of "privy tithes," which the defendants alleged were personal tithes, and not compositions for small tithes. The vicar, unable to produce an endowment, gave secondary evidence showing that the vicarage was endowed generally with small tithes. There was no evidence that any small tithes were ever paid to or claimed by the rector, or the persons entitled to the rectory. Held,

1. That the defendants, after failing to show title to the small tithes in themselves or the owners of the lands, could not be heard to say that the small payments in the name of privy tithes were compositions.

2. That privy tithes are not personal tithes, but are the same as small tithes.
3. That where there is evidence that the vicarage was endowed with small tithes, the vicar's right to them is established against all lands within the parish as to which no particular discharge is proved; although no small tithes have ever been paid.
4. Where any of the defendants proved a particular discharge of the lands in his occupation, or showed they were originally part of the glebe lands, the vicar's bill against them was dismissed with costs, but without costs as to such defendants as did not make and prove that defence in the Court below.—*Clee and others v. Hall*, p. 744.

To a rector's bill against the owner and occupiers of lands for an account of tithes, they by their answers set up an agreement, made in 1711, between the then rector and the owner of the lands (who was also patron of the living), by which certain lands and a perpetual annuity were given to the rector in exchange for his glebe lands, and for the discharge from tithes of the lands occupied by the defendants. The agreement continued to be beneficial to the church, having been made with reference to the probable future increase in the value of the tithes: it was approved by the Ordinary and established by a decree of the Court of Chancery, and acted on down to the filing of the bill, when the rector refused to accept the annuity, but still retained the lands which were allotted to him in the exchange, and which were much more valuable than the old glebe lands.—

Held, that although it was open to the rector to put an end to the agreement, as being void under the disabling statutes, he was not entitled to the aid of equity to enforce his legal title to the tithes while he retained part of the consideration for their discharge, contrary to the principle "that he who seeks equity must do equity."—*Plowden v. Thorpe*, p. 137.

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TREES.

A clause in an indenture of lease, reserving, out of the demise, to the lessor, "all wood and underwood, timber and timber trees, standing, growing, or being thereon, or at any time thereafter to stand or grow thereon, with full and free liberty of ingress and egress to take and carry away the same," applies only to trees standing when the lease was granted, and not to those afterwards planted by the tenant. Its operation is so restricted by the 23 & 24 *Geo.* 3, c. 39.—*Galwey v. Baker*, p. 379.

TRUSTEE. See **DEED**, 1. **OFFICER**, 1.

TRUSTS.

The execution of a trust deed for (among other things) the payment of creditors, does not constitute one of the creditors, who became so after the execution of the deed, and was not a party to it, a *cestui que* trust, entitled to call on the trustee to execute the trusts of the deed.

A. executed a trust deed, appointing *B.* trustee for certain purposes therein stated, one of which was for the payment of creditors, and another was to raise a sum of money by way of mortgage, in order to satisfy a claim for rent due in respect of *A.*'s lands, then about to be enforced by ejectment. *B.* obtained from *C.* an advance of money, with which he satisfied this claim. *B.* afterwards gave to *C.* a letter, written subsequently to, but dated before the day of the advance; in which, appearing to ask for the advance, he said, "I will consider such advance as raised by me under the power given me; and will, whenever you please, exercise that power, by securing such advance in the best manner I am empowered by the deed." No security was ever executed by *B.* Held, that *C.* did not stand in the situation of a *cestui que* trust under the deed, and could not maintain a bill in equity, calling on *B.* to execute the trust of the deed.—*La Touche v. Earl of Lucan*, p. 772.

VICAR. See **TITHES**.

WILL, CONSTRUCTION OF.

A testator by his will gave the residue of his personal estate to his wife for her life, and after her decease to Sir *C. E. D.* absolutely: he subsequently, by a codicil, which did not affect the gift of the residue, altered his will in some

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